No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOVAN MCCLENTON,

Petitioner

v.

STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari
to the Court of Appeal of the State of California,
Second Appellate District, Division 4

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re JOVAN MCCLENTON,

on Habeas Corpus.

B293648

(Los Angeles County
Super. Ct. No. BA104610)
(Lisa B. Lench, Judge)

ORDER

THE COURT:*

The petition for writ of habeas corpus filed November 6, 2018, has been read and considered and is denied as moot under Penal Code section 3051.

* WILLHITE, Acting P. J.

COLLINS, J.

Appendix A

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 108 HON. LISA B. LENCH, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF/RESPONDENT,

VS.

01 JOVAN MCCLENTON,

DEFENDANT/PETITIONER.

NO. BA104610

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SEPTEMBER 6, 2018

APPEARANCES:

FOR PLAINTIFF/RESPONDENT:
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BY: JUDITH PETTIGREW, DEPUTY
BY: EMILY SPEAR, DEPUTY
HALL OF RECORDS
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LOS ANGELES, CALIFORNIA 90012

FOR DEFENDANT/PETITIONER:
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JOYCE KATHLEEN HEDLUND, CSR NO. 9878
OFFICIAL REPORTER

CASE NUMBER:	BA104610
CASE NAME:	PEOPLE VS. JOVAN MCCLENTON
LOS ANGELES, CALIFORNIA	THURSDAY, SEPTEMBER 6, 2018
DEPARTMENT 108	HON. LISA B. LENCH, JUDGE
REPORTER:	JOYCE K. HEDLUND, CSR NO. 9878
TIME:	A.M. SESSION

APPEARANCES:

DEFENDANT/PETITIONER NOT PRESENT IN COURT, REPRESENTED BY LESLIE RINGOLD, DEPUTY PUBLIC DEFENDER OF LOS ANGELES COUNTY; JUDITH R. PETTIGREW, DEPUTY DISTRICT ATTORNEY OF THE COUNTY OF LOS ANGELES, AND EMILY SPEAR, DEPUTY DISTRICT ATTORNEY OF THE COUNTY OF LOS ANGELES, REPRESENTING PLAINTIFF/RESPONDENT, THE PEOPLE OF THE STATE OF CALIFORNIA,

THE COURT: IN THE MATTER OF PEOPLE VERSUS JOVAN MCCLENTON, CASE NO. BA104610. MATTER IS HERE FOR FURTHER PROCEEDINGS ON THE DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS.

COUNSEL, STATE YOUR APPEARANCES, PLEASE.

MS. RINGOLD: THANK YOU, YOUR HONOR. GOOD MORNING.

LESLIE RINGOLD, R-I-N-G-O-L-D, DEPUTY PUBLIC DEFENDER, ON BEHALF OF MR. MCCLENTON, WHO IS PRESENTLY IN THE CUSTODY OF THE DEPARTMENT OF CORRECTIONS.

MS. PETTIGREW: JUDITH PETTIGREW, DEPUTY DISTRICT ATTORNEY, FOR RESPONDENT, LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE.

THE COURT: ALL RIGHT. MY INTENTION TODAY WAS, AND STILL IS, TO DEAL WITH THE ISSUE OF WHETHER OR NOT IT'S APPROPRIATE IN THIS INSTANCE FOR THE COURT TO GRANT A NEW SENTENCING HEARING, OR WHETHER IT IS APPROPRIATE FOR THE COURT TO HAVE THE SENTENCE THAT WAS ORIGINALLY IMPOSED BY THE TRIAL COURT JUDGE REMAIN AND AFFORD THE DEFENDANT, OR PETITIONER, AN OPPORTUNITY TO PRESENT INFORMATION THAT WOULD BE MADE PART OF THE RECORD FOR PURPOSES OF ANY PAROLE ELIGIBILITY DETERMINATION MADE BY THE DEPARTMENT OF CORRECTIONS PURSUANT TO PENAL CODE SECTION 3051.

AND THERE HAS BEEN A LOT OF BRIEFING ON THAT ISSUE. THERE HAS BEEN A LOT OF DISCUSSION ABOUT THAT ISSUE. AND I HAVE TO SAY THAT I THINK THE PRESENTATION OF ARGUMENTS HAS PRETTY MUCH BEEN EXHAUSTED; WELL COVERED, BUT EXHAUSTED.

I DID GET A CASE TODAY, WELL, AN UNPUBLISHED CASE, FROM MS. PETTIGREW, WHICH I HAVE TO SAY I DIDN'T LOOK AT; A PUBLISHED CASE FROM MS. RINGOLD, *RICHARD CARTER*, WHICH APPARENTLY WAS FILED YESTERDAY, OUT OF THE THIRD APPELLATE DISTRICT, WHICH I DID LOOK AT.

NONE OF THE CONTENTS OF *CARTER* CHANGED MY THOUGHT PROCESS AS I HAVE ENTERED INTO IT WITH INCREDIBLE TIME, CONCERN, AND I BELIEVE ADEQUATE UNDERSTANDING.

SO MS. RINGOLD, I AM CONFIDENT THAT THERE IS SOME INFORMATION YOU WANT TO IMPART TO THE COURT. I HAVE TO TELL YOU, YOUR BRIEFING HAS BEEN QUITE THOROUGH. I HAVE READ IT.

I ADMIRE YOUR ABILITY TO PRESENT ARGUMENTS. YOU REALLY DID A FABULOUS JOB OF WORKING THIS CASE. AND I'M TELLING YOU THAT IN ALL SINCERITY, BECAUSE I DON'T SEE BRIEFS

AS THOROUGH AND PERSUASIVE AS I GOT IN YOUR CASE. SO I WANT YOU TO KNOW THAT.

I HAVE RECEIVED EQUALLY COMPELLING INFORMATION FROM THE PEOPLE. IT'S JUST ON A SHORTER -- IN A MORE ABBREVIATED VERSION, BECAUSE THE PEOPLE'S POSITION IS PRETTY CLEAR, THAT 3051 OF THE PENAL CODE HAS TAKEN CARE OF THE ISSUE AS FAR AS THE CONSTITUTIONALITY OF LENGTHY SENTENCES.

AND THE PEOPLE AGREE THAT MR. MCCLENTON SHOULD BE GIVEN AN OPPORTUNITY TO PRESENT THE INFORMATION AT A, QUOTE, UNQUOTE, "*FRANKLIN*-TYPE HEARING," TO BE FORWARDED TO THE DEPARTMENT OF CORRECTIONS FOR CONSIDERATION ON PAROLE.

WOULD THAT BE ACCURATE IN TERMS OF YOUR POSITION, MS. PETTIGREW?

MS. PETTIGREW: YES.

THE COURT: AND I NOTE FOR THE RECORD THAT MS. SPEAR HAS JOINED US WITH MY UNDERSTANDING THAT YOU HAVE BEEN REASSIGNED; IS THAT CORRECT?

MS. SPEAR: THAT'S CORRECT.

THE COURT: OKAY. SO TO ME RIGHT NOW WHAT NEEDS TO BE RESOLVED IS, IS THERE GOING TO BE A NEW SENTENCING HEARING OR NOT. AND I HAVE READ EVERY CASE THERE IS TO READ. I UNDERSTAND WHY YOU DISAGREE, YOU, MS. RINGOLD, AND YOU, MS. PETTIGREW, IN TERMS OF WHETHER THERE SHOULD BE ONE OR NOT.

I'M HAPPY TO GIVE YOU AN OPPORTUNITY, MS. RINGOLD, TO LET ME KNOW WHAT IT IS YOU THINK I NEED TO KNOW THAT HASN'T BEEN COVERED IN YOUR BRIEFS, WITH THE CAVEAT THAT I REALLY HAVE READ EVERYTHING.

MS. RINGOLD: I WOULD JUST ASK TO BE HEARD, BUT I WILL BE BRIEF, YOUR HONOR.

THE COURT: OKAY.

MS. RINGOLD: I DO OBJECT TO THE UNPUBLISHED CASE THAT --

THE COURT: I DIDN'T READ IT.

MS. RINGOLD: VERY WELL. THANK YOU.

AND I THINK THAT THE ISSUE IN *CARTER*, WHICH I'VE READ ONCE THOROUGHLY, BUT NOT MORE THAN -- NOT AS MANY TIMES AS I WOULD LIKE TO BECAUSE IT WAS JUST YESTERDAY, I THINK HELPS US CRYSTALIZE WHAT THE ISSUE IS BEFORE THE COURT, EVEN THOUGH IT'S A DIFFERENT FACTUAL SCENARIO THAN OURS.

THE COURT: IT'S DIFFERENT IN THE FACTUAL BECAUSE 3051 DOESN'T APPLY IN THAT CASE, AND IT DOES APPLY IN THIS CASE, WHICH I THINK IS AN INCPEDIBLE DIFFERENCE.

MS. RINGOLD: AND I AGREE WITH THAT, EXCEPT THE ISSUE IS THAT THE *FRANKLIN* COURT, IN THEIR SENTENCE WHERE THEY SAID, WE EXPRESS NO VIEW AS TO MOOTNESS, AND LIMITED THEIR MOOTNESS HOLDING TO MANDATORY SENTENCES, MADE TWO SPECIFIC CARVE-OUT EXCLUSIONS.

THE FIRST CLAUSE BEFORE THE WORD "OR" HAS TO DO WITH THE FOLKS WHO ARE NOT ELIGIBLE FOR 3051.

THE COURT: CORRECT.

MS. RINGOLD: THE SECOND CLAUSE OF THE SENTENCE, EQUALLY AS IMPORTANT, AND IN MY OPINION CERTAINLY NOT ABLE, AS THE PEOPLE HAVE DONE, TO BE RELEGATED TO SURPLUSAGE, IS THE FOLKS WHO HAVE LENGTHY DISCRETIONARY SENTENCES.

AND IT'S CLEAR TO ME THAT THE *FRANKLIN* COURT WAS

WELL AWARE OF 3051 AND WOULD BE WELL AWARE THAT *FRANKLIN* -- THAT 3051 DID APPLY TO THOSE INDIVIDUALS IN THE SECOND CLAUSE OF THEIR SENTENCE, THOSE WHO FELL INTO THE GROUP AFTER THE WORD "OR."

THE COURT: WELL --

MS. RINGOLD: AND I THINK THE REASON FOR THAT, YOUR HONOR -- I'M SORRY. I THINK THE REASON IS THAT WHEN THE COURT EXERCISES ITS DISCRETION, AND NOW PURSUANT TO *MONTGOMERY* -- *MILLER*, AS WE KNOW, IS RETROACTIVE. WHEN THE COURT EXERCISES ITS DISCRETION OR HAS THE ABILITY, I SHOULD SAY, TO EXERCISE ITS DISCRETION IN CASES LIKE THESE, IT MUST DO SO WITH APPLICATION OF THE *MILLER* FACTOR. OTHERWISE, THE SENTENCE IS IN VIOLATION OF THE EIGHTH AMENDMENT AND DISPROPORTIONATE.

AND THE REASON I THINK *CARTER* APPLIES TO US, IT APPEARS TO APPLY, EVEN THOUGH IT'S DEALING WITH THOSE WHO ARE EXCLUDED FROM 3051, IS BECAUSE THE DISCUSSION IN *CARTER* SPECIFICALLY REFERENCES THE NEED FOR THE COURT IN A *ROMERO* CONTEXT TO INCLUDE IN ITS CONSIDERATION OF APPLIED *ROMERO*, INCLUDE IN ITS DISCRETIONARY EXERCISE OF APPLYING *ROMERO* THOSE SAME *MILLER* FACTORS IN A CONTEXT LIKE *CARTER*.

SO THE REASON WHY I THINK IT APPLIES IS BECAUSE IT'S TELLING US A COURT THAT CAN EXERCISE ITS DISCRETION IN CASES MUST, NUMBER ONE, UNDER *GRAHAM*, AT THE OUTSET NOT IMPOSE A SENTENCE OF DE FACTO L.W.O.P. ON NON-HOMICIDE CASES.

BUT ALSO, THAT WHEN THE COURT EXERCISES ITS DISCRETION AND IMPOSES A LENGTHY DETERMINATE SENTENCE IN THE PAST, PRIOR TO *MILLER*, THERE MUST BE A DE NOVO RESENTENCING

IN ORDER THAT THE DISCRETION OF THE COURT CAN BE APPLIED CONSTITUTIONALLY.

IN THOSE CASES WHERE THE TRIAL COURT, LIKE IN MR. FRANKLIN'S CASE, LIKE IN SO MANY OF THOSE -- IN ALL OF THE MANDATORY SENTENCING CASES, WHEN THE COURT NOW WOULD NOT HAVE THE ABILITY TO APPLY IT, ANY DISCRETION IN A CASE, THOSE ARE THE ONES THAT ARE THE FIRST CLAUSE. THOSE ARE THE MANDATORY SENTENCES -- EXCUSE ME. THOSE AREN'T THE FIRST CLAUSE. THOSE ARE THE MANDATORY SENTENCES FOR WHICH 3051 APPLIES.

AND THE ONLY -- I KNOW I'VE SET THIS FORTH IN MY BRIEFING, BUT THE OTHER THING THAT I JUST WANTED TO REFERENCE -- AND I DON'T THINK I SAID THIS AS CLEARLY AS I SHOULD HAVE -- IS THAT IT REALLY DOES MAKE A DIFFERENCE.

THE COURT'S DISCRETIONARY EXERCISE THAT'S AVAILABLE IN MR. MCCLENTON'S CASE COULD LEAD TO A SENTENCE OF -- AS THE PEOPLE HAVE CONCEDED, A MANDATORY MINIMUM SENTENCE IS 38 YEARS. SO IRRESPECTIVE OF 3051, BECAUSE OF WHAT A DETERMINATE SENTENCE PROMISES BY ITS NATURE, THAT'S A SENTENCE THAT A DEFENDANT COULD GAIN RELEASE IRRESPECTIVE OF 3051. AND I THINK THAT'S THE OTHER PIECE OF THIS THAT'S VERY, VERY IMPORTANT.

SO WE HAVE THE NON-HOMICIDE CASE, WE HAVE AN OVERWHELMINGLY DISCRETIONARY CASE, AND WE HAVE A DETERMINANT SENTENCE IN THE END, SO THAT THERE IS SOMETHING VERY DIFFERENT ABOUT THAT. AND I THINK THAT THE SUPREME COURT IN *FRANKLIN* RECOGNIZED THAT. AND IN SAYING "LENGTHY DISCRETIONARY SENTENCES," THEY'RE LOOKING AT THOSE ISSUES.

SO I UNDERSTAND THE COURT'S REVIEWED EVERYTHING, BUT I DO THINK THAT THESE ARE THREE VERY IMPORTANT PIECES.

THE COURT: AND I'LL AGREE WITH YOU, MS. RINGOLD, THAT THAT IS AN INTERPRETATION OF EVERYTHING. I TOTALLY AGREE WITH YOU THAT MR. MCCLENTON'S SENTENCE IS -- EVERYTHING OVER 38 YEARS WAS DISCRETIONARY.

MS. RINGOLD: WELL, ACTUALLY, EVEN THE -- BUT YES. THE MANDATORY MINIMUM, YES. BUT IT IS A DISCRETIONARY SENTENCING PIECE EVEN AT 38 YEARS, BECAUSE ALL OF THE TERMS INVOLVE THE COURT'S EXERCISE OF DISCRETION, LOW, MIDDLE, OR HIGH. BUT YES, I UNDERSTAND. I DON'T MEAN TO INTERRUPT THE COURT.

THE COURT: OKAY. AND THERE ARE CASES WHICH SUGGEST THAT THE COURT IS PUT IN A POSITION OF SOME PERIL IN SELECTING A DETERMINANT NUMBER THAT MAY OR MAY NOT BE CONSTITUTIONAL, BECAUSE NOBODY CAN MAKE A DETERMINATION AS TO WHAT IS BEYOND THE LIFE EXPECTANCY OF ANY PARTICULAR INDIVIDUAL OR ANY GROUP OF INDIVIDUALS.

AND I KNOW THAT IN *CONTRERAS* THERE WAS A DISCUSSION BETWEEN THE MAJORITY AND THE DISSENT ABOUT THAT VERY ISSUE. AND THE DISSENT -- THE DISSENT AND THE MAJORITY, IN A FOUR-THREE DECISION, HAD SOME VERY STRONG DIFFERING OPINIONS ABOUT IT. I UNDERSTAND HOW THE MAJORITY CAME DOWN ON THAT.

BUT I ALSO THINK THERE NEEDS TO BE A REALITY CHECK HERE IN MY MIND. THIS CASE IS NOT ONE THAT I'M HAVING AN EASY TIME CONSIDERING IN THE ABSTRACT. THIS CASE INVOLVES ONE WHERE FIVE WOMEN WERE BRUTALLY SEXUALLY ASSAULTED, TWO OTHER WOMEN WERE BRUTALLY ROBBED.

AND I AM NOT IN A POSITION TO SAY, QUITE FRANKLY, WHEN I ORIGINALLY READ THIS OPINION -- READ THIS SENTENCE, THAT I WOULD HAVE DONE ANYTHING ANY DIFFERENT.

I UNDERSTAND WHAT *GRAHAM* SAYS. I UNDERSTAND WHAT *MILLER* SAYS. I UNDERSTAND THAT SENTENCES LIKE THIS ARE LEFT FOR A PARTICULAR CLASS OF INDIVIDUAL. BUT I'M NOT SURE WHAT SENTENCE I CAN IMPOSE SHORT OF WHAT THE ORIGINAL TRIAL JUDGE IMPOSED IN HIS EXERCISE OF DISCRETION THAT WOULD BE CONSTITUTIONAL, BECAUSE I DON'T THINK THAT WHAT HE GOT IS AN UNWARRANTED SENTENCE GIVEN WHAT THE FACTS ARE OF THIS CASE.

SO I CAN'T LOOK AT THIS AND JUST SAY, OKAY, YOU KNOW WHAT? I COULD DO A RESENTENCING. BUT I'M NOT SURE I'D END UP AT ANY DIFFERENT PLACE EVEN CONSIDERING EVERY SINGLE FACTOR OF YOUTH THAT IS POTENTIALLY INVOLVED.

AND I UNDERSTAND WHAT THEY ARE. I'VE READ THE DECLARATIONS. I'VE READ THE CASE LAW. I'VE READ WHAT THE CURRENT PSYCHOLOGICAL EXPERTS AND INFORMATION IS ON THE SUBJECT.

MR. MCCLENTON MAY BE IN A VERY SPECIAL SITUATION, BUT I ALSO HAVE TO KEEP IN MIND WHAT HAPPENED IN THIS CASE. AND I AM NOT CONVINCED THAT I WOULD DO ANYTHING ANY DIFFERENT EVEN IF I CONSIDERED EVERY SINGLE FACTOR OF YOUTHFULNESS; OR IN THE ALTERNATIVE, THAT I WOULD GIVE HIM A SENTENCE THAT WOULD NOT BE THE FUNCTIONAL EQUIVALENT OF AN L.W.O.P. SENTENCE, BECAUSE I DON'T KNOW WHAT HIS LIFE EXPECTANCY IS.

AND I COULD SET A DETERMINATE TERM THAT WOULD ALLOW HIM TO GET OUT AT SOME OLD AGE THAT HE MAY OR MAY NOT MAKE. BUT THERE ARE CASES THAT SUGGEST THAT EVEN THAT'S

UNCONSTITUTIONAL.

SO I'M LEFT IN A POSITION OF SAYING, YES, THERE IS A SENTENCE. AND THERE ARE CASES WHICH SUGGEST -- AND I DISAGREE WITH YOU AS TO HOW -- AS TO WHETHER THEY MAKE IT ABSOLUTE. I UNDERSTAND YOUR POSITION IS THAT IT'S ABSOLUTE. I'M NOT SURE THAT I AGREE WITH YOU ON THAT, THAT IT IS UNCONSTITUTIONAL FOR HIM TO HAVE A SENTENCE THAT IS FUNCTIONAL L.W.O.P.

SO I HAVE TO LOOK TO WHAT HAS HAPPENED SINCE THIS SENTENCE WAS IMPOSED AND THE STATE OF THE LAW THAT EXISTS AT THIS POINT IN TIME. AND I UNDERSTAND THE CARVE-OUT THAT *FRANKLIN* HAS THAT YOU ARE RELYING ON.

THE REASON THAT IT MAY BE IS NOT BECAUSE THE COURT WAS UNAWARE OF 3051, BUT BECAUSE IT WAS DEALING WITH THE CASE THAT WAS BEFORE IT AND NOT ANOTHER SET OF HYPOTHETICAL SITUATIONS. THAT'S WHAT COURTS DO. THAT'S WHAT SUPREME COURTS DO.

SO I'M IN A SITUATION NOW WHERE I'VE GOT A BRUTAL SEX CASE WHERE A DEFENDANT, WHO WAS NOT THAT FAR FROM 18, WAS CONVICTED AND DISCRETIONARILY SENTENCED TO AN INCREDIBLY LENGTHY SENTENCE THAT HE WILL NEVER BE ABLE TO SERVE WITHOUT DYING IN PRISON.

IN MY OPINION, 3051 IS THE OUT FOR HIM. IN MY OPINION, IT'S NOT RESENTENCING. IN MY OPINION, 3051 GIVES HIM THE OPPORTUNITY TO DEMONSTRATE HOW WHAT HE DID WAS BASED ON YOUTHFUL FACTORS; THAT HE NOW HAS HAD THE OPPORTUNITY TO MATURE, TO RECOGNIZE THAT WHAT HE DID WAS WRONG, TO HAVE THE CRIMES THAT HE COMMITTED CONSIDERED IN THE CONTEXT OF ALL OF

THE IMPULSIVENESS, AND PEER PRESSURE, AND OTHER FACTORS THAT DEAL WITH SOMEONE OF HIS AGE. THAT'S WHAT 3051 IS THERE FOR.

AND I HAVE GIVEN THIS AN INCREDIBLE AMOUNT OF THOUGHT. AND IF I'M WRONG, I'M WRONG. THAT'S WHAT HIGHER COURTS ARE FOR.

I WILL MENTION THAT THIS VIEW THAT I HAVE WAS ONE THAT WAS ARTICULATED BY THE COURT OF APPEAL IN *PEOPLE VS. SCOTT*. THE PUBLISHED OPINION -- REVIEW WAS DENIED BY THE SUPREME COURT. AND THAT COURT CAME TO THE CONCLUSION THAT 3051 IS THE MECHANISM FOR PROVIDING JUVENILE NON-HOMICIDE OFFENDERS WITH A MEANINGFUL OPPORTUNITY FOR RELEASE. NO IFS, ANDS, OR BUTS ABOUT IT. AND IT LISTED THE REASONS THAT THEY FELT THAT WAY. AND I FIND THEIR REASONING COMPELLING.

I UNDERSTAND THE IMPACT OF WHAT I'M SAYING. AND AS I SAID, IF I'M WRONG, I'M WRONG. BUT I CAN'T LOOK AT THIS IN ANY OTHER WAY THAN TO LOOK AT ALL THAT IS BEFORE ME.

I AM PERSUADED BY THE REASONING IN THE *SCOTT* CASE, AND I AM PERSUADED BY MY OWN EVALUATION OF THE STATE OF THE LAW AT THIS POINT IN TIME.

I DON'T THINK I AM REQUIRED TO GIVE MR. MCCLENTON A NEW SENTENCING HEARING. I THINK WHAT I'M REQUIRED TO DO IS GIVE HIM AN OPPORTUNITY TO PRESENT TO THIS COURT ALL THE INFORMATION THAT ANYBODY WOULD NEED TO MAKE AN EVALUATION AS TO WHEN AND IF HE SHOULD BE RELEASED.

HE WAS ELIGIBLE FOR A HEARING AFTER 15 YEARS OF HIS SENTENCE. HE STILL REMAINS ELIGIBLE FOR A HEARING. I KNOW HE HAS ALREADY MADE HIS APPLICATION, AND I KNOW THAT THE DEPARTMENT OF CORRECTIONS HAS DEFERRED IT.

I WANT TO GIVE HIM AN OPPORTUNITY TO PRESENT WHATEVER INFORMATION HE THINKS THE DEPARTMENT OF CORRECTIONS, AND THE BOARD OF PAROLE HEARINGS, AND THE YOUTHFUL OFFENDER PAROLE BOARD, OR WHOEVER IS MAKING UP THEIR MINDS ABOUT HIS RELEASE NEEDS IN ORDER TO MAKE UP THEIR MIND ABOUT HIS RELEASE. BUT THAT'S MY BELIEF AS TO WHAT THE STATE OF THE LAW IS AND WHAT THE CURRENT INTERPRETATION OF THE CASES IS AS IT APPLIES TO HIS CASE.

MS. PETTIGREW: YOUR HONOR --

THE COURT: YES?

MS. PETTIGREW: -- WOULD YOU GIVE ME THE CITE TO THE *SCOTT* CASE?

THE COURT: 3 CAL.APP.5TH 1265. IT'S OUT OF THE FOURTH --

MS. RINGOLD: 365?

MS. PETTIGREW: 1265.

THE COURT: 3 CAL.APP.5TH 1265.

MS. PETTIGREW: MAY I --

THE COURT: YES?

MS. PETTIGREW: -- ADD ONE COMMENT?

THE COURT NOTED THAT WHEN THE CALIFORNIA SUPREME COURT DECIDED *FRANKLIN*, IT WAS ADDRESSING THE FACTS OF THE CASE IN *FRANKLIN'S* SITUATION, WHERE THE TRIAL COURT WAS FACED WITH ITS OBLIGATION TO IMPOSE A MANDATORY SENTENCE FOR MURDER AND USE OF A FIREARM.

AND THAT WAS -- THOSE WERE THE FACTS THAT THE COURT HAD TO ADDRESS, THE TRIAL COURT HAD TO ADDRESS, AND THE SUPREME COURT IN RESPONDING TO A CHALLENGE TO THE SENTENCE.

AND WHAT THE SUPREME COURT SAYS IS WE MAKE -- WE CAN'T ANALYZE A SITUATION WHERE A DEFENDANT HAS A LENGTHY DISCRETIONARY SENTENCE.

BUT WHAT IS NOT CLEAR TO ME, AND WHAT I DON'T BELIEVE COUNSEL HAS ARTICULATED, IS WHY OR UNDER WHAT CIRCUMSTANCES MR. MCCLENTON WOULD NOT BE ELIGIBLE FOR A 3051 HEARING, DESPITE THE FACT THAT HIS LENGTHY SENTENCE, OVERALL SENTENCE, IS A FUNCTION OF THE COURT'S DISCRETION; EVEN THOUGH THERE WAS A RELATIVELY SMALL PORTION OF THE SENTENCE WHICH WAS A MANDATORY SENTENCE, 38 YEARS.

SO COUNSEL HAS NOT ARTICULATED WHY 3051 DOESN'T APPLY TO HIM. 3051 WAS ENACTED TO ADDRESS THE SITUATION OF AN INDIVIDUAL WHO HAS A LENGTHY SENTENCE, WHICH THE UNITED STATES SUPREME COURT SAYS VIOLATES THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE.

SO HE HAS AN OPPORTUNITY FOR RELEASE ON PAROLE, WHICH ADDRESSES THE UNCONSTITUTIONALITY OF HIS SENTENCE. AND THAT SHOULD BE THE SOLUTION.

THE COURT: WELL, I DON'T THINK COUNSEL IS SUGGESTING THAT HE'S NOT ELIGIBLE. IN FACT, SHE'S ALWAYS MAINTAINED HER POSITION THAT HE IS ELIGIBLE. BUT AS A FALL-BACK POSITION RATHER THAN AS THE INITIAL POSITION, THAT HE SHOULD BE ENTITLED TO A NEW SENTENCING HEARING BECAUSE HIS SENTENCE IS AT THE OUTSET UNCONSTITUTIONAL. IT IS A LIFE WITHOUT PAROLE SENTENCE IF IT'S LOOKED AT IN THE ABSTRACT.

BUT THERE ARE MANY, MANY CASES THAT HAVE COME DOWN SINCE *FRANKLIN* THAT HAVE ANALYZED, MORE OFTEN THAN NOT, MANDATORY SENTENCES RATHER THAN DISCRETIONARY SENTENCES.

THERE ARE NOT A LOT OF CASES THAT HAVE ANALYZED DISCRETIONARY SENTENCES. BUT A DISCRETIONARY SENTENCE HAS TO BE LOOKED AT AS WHAT IT IS ALSO, AND A BELIEF BY A SENTENCING COURT THAT ITS DECISION IS WARRANTED IN ITS EXERCISE OF DISCRETION TO BE WHAT IT CAME UP WITH.

I UNDERSTAND THAT THE *GRAHAM* AND *MILLER* LINE OF CASES DIDN'T EXIST AT THAT TIME, BUT THAT DOESN'T MEAN THAT THE COURT WAS UNAWARE OF MR. MCCLENTON'S AGE. THAT DOESN'T MEAN THAT THE COURT WAS UNAWARE OF ALL KINDS OF FACTORS THAT IT USED IN EXERCISING ITS DISCRETION.

I UNDERSTAND THE TRANSCRIPT DOESN'T SAY THAT HE -- THAT THE TRIAL JUDGE WENT THROUGH THE CURRENT PSYCHOLOGICAL FACTORS THAT ARE THE SUBJECT MATTER OF *GRAHAM* AND *MILLER* AND THE CASES THAT FOLLOW. I DON'T THINK THAT MEANS THAT THERE ISN'T SOME MERIT TO THE EXERCISE OF DISCRETION THAT THE COURT ENGAGED IN.

ALL THAT BEING SAID, MR. MCCLENTON CLEARLY HAS AN AVENUE FOR RELEASE. THERE IS NO DISPUTE THAT HE HAS AN AVENUE FOR RELEASE. HE HAS AN AVENUE FOR RELEASE THAT'S CURRENTLY AVAILABLE TO HIM.

ALL THAT NEEDS TO BE DONE IN MY OPINION IS THAT THE YOUTHFUL OFFENDER PAROLE BOARD HAS TO BE GIVEN WHATEVER ADDITIONAL INFORMATION ABOUT HIM CAN BE DEVELOPED AT AN APPROPRIATELY CONDUCTED, QUOTE, UNQUOTE, "*FRANKLIN*-TYPE HEARING."

AND THERE ARE OTHER CASES THAT COURTS USE TO DESCRIBE THAT HEARING. BUT IT'S THE HEARING THAT I THINK WE ALL KNOW ARE GIVING THE SAME MEANING TO, WHICH IS ONE WHERE

THOSE FACTORS ARE PRESENTED TO A COURT AND MADE PART OF THE RECORD.

AND ANY CONCERN THAT IT'S NOT GOING TO BE PART OF THE RECORD, THAT IT'S NOT GOING TO BE FORWARDED TO THE DEPARTMENT OF CORRECTIONS AND REHABILITATION, THAT IT'S NOT GOING TO BE FORWARDED TO THE YOUTHFUL OFFENDER PAROLE BOARD, IT WILL BE. I WILL MAKE SURE THAT THAT HAPPENS.

HOW THEY CONSIDER IT IS THEIR BUSINESS. I CAN'T CONTROL THAT. THERE ARE OTHER AVENUES AVAILABLE IF THERE'S SOME SUGGESTION THAT THEY ACT UNFAIRLY. BUT THAT'S ALL SOMETHING FOR THE FUTURE.

WHAT I'M DEALING WITH NOW IS WHETHER OR NOT IN MY OPINION MR. MCCLENTON IS ENTITLED TO A NEW SENTENCING. AND IN MY OPINION, HE IS NOT.

SO IT IS MY INTENTION TO MOVE FORWARD WITH WHATEVER HEARING AND EVIDENCE PETITIONER WISHES TO PRESENT FOR CONSIDERATION BY THE YOUTHFUL OFFENDER PAROLE BOARD IN DETERMINING THE PROPRIETY OF RELEASE OF MR. MCCLENTON WHENEVER THAT SHOULD BECOME AN ISSUE FOR HIM.

MS. RINGOLD: IF I -- I UNDERSTAND THE COURT'S INDICATED, THE COURT'S POSITION, BUT --

THE COURT: I HAVEN'T INDICATED IT. I THINK I PRETTY MUCH RULED.

MS. RINGOLD: RULED.

BUT IF I JUST -- JUST TO MAKE THE RECORD CLEAR, THE DE NOVO PROCEEDING WOULD NOT BE -- THE INTENTION, IF THERE HAD BEEN AN OPPORTUNITY FOR THAT, WOULD BE NOT FOR THE COURT TO ONLY APPLY THE LEGAL SCHOLARS, AND THE

NEUROSCIENTISTS, AND THE EXISTING CASE LAW, BUT OF COURSE TO ACCEPT, PURSUANT TO THE COURT'S RULINGS, EVIDENCE FROM THE DEFENSE ON THOSE ISSUES; EVIDENCE THAT WOULD NOT HAVE BEEN AND WAS NOT PRESENTED AT THE FIRST HEARING --

THE COURT: CORRECT.

MS. RINGOLD: -- THAT THE FIRST TRIAL COURT DID NOT HAVE THE BENEFIT OF BECAUSE, OF COURSE, THOSE *MILLER* FACTORS WERE NOT SOMETHING THAT WAS BEFORE ANY OF US AT THAT TIME.

SO THE ABILITY OF THIS COURT TO EXERCISE ITS DISCRETION NOW WOULD NOT SIMPLY BE APPLYING THE *MILLER* FACTORS IN A WAY -- IN THE ABSTRACT, BUT WOULD BE A CONSIDERATION AND AN ACTUAL EXERCISE OF THE COURT'S DISCRETION WITH PERMITTED INPUT FROM THE PARTIES AS TO THE RELEVANT FACTS ADDRESSING THE *MILLER* FACTORS.

THE COURT: I UNDERSTAND THAT, MS. RINGOLD.

MS. RINGOLD: VERY WELL.

THE COURT: I UNDERSTAND THAT.

I ALSO UNDERSTAND THAT TO THE EXTENT THESE SEVEN WOMEN WOULD WANT TO MAKE VICTIM IMPACT STATEMENTS, THEY'D BE ALLOWED TO DO THAT, TOO. I ALSO HAVE TO A CONSIDER WHETHER I WANT TO PUT THEM THROUGH THAT.

SO THERE ARE -- THERE ARE A LOT OF FACTORS THAT IN MY OPINION NEED TO BE TAKEN INTO CONSIDERATION. AND I UNDERSTAND THAT THOSE FACTORS ARE FACTORS THAT WOULD BE RELEVANT IF THERE WERE A SENTENCING HEARING TO BE HELD TODAY. THAT'S NOT WHAT I'M DOING. I DECIDED THAT THAT IS NOT CONSTITUTIONALLY REQUIRED.

AS I SAID, IF I'M WRONG, I EXPECT THAT A COURT OF

APPEAL WILL LET ME KNOW I'M WRONG, AND I WILL DO WHATEVER I'M TOLD TO DO. BUT THAT'S -- I CAN ONLY MAKE MY BEST ASSESSMENT.

MS. RINGOLD: MAY I HAVE A MOMENT TO CONFER WITH COUNSEL AND PERHAPS APPROACH REGARDING SCHEDULING --

THE COURT: SURE.

MS. RINGOLD: -- A COUPLE OF SCHEDULING SUGGESTIONS, SEE WHAT EVERYBODY THINKS?

THE COURT: I ALSO DON'T KNOW WHO'S GOING TO BE DOING IT. I KNOW MS. SPEAR IS NOT GOING TO BE DOING IT. I ASSUME MS. PETTIGREW ISN'T GOING TO BE DOING IT. I ASSUME IT WILL BE SOMEBODY THAT IS NEITHER OF THE LAWYERS WHO ARE HERE. BUT YOU ARE WELCOME TO DISCUSS WITH THEM WHATEVER YOU WANT TO DISCUSS WITH THEM.

MS. RINGOLD: I'M SURE THEY'LL AGREE TO SOMETHING, AND WHOEVER IS IN THEIR STEAD WILL FOLLOW THEIR AGREEMENT.

(A DISCUSSION IS HELD OFF THE RECORD.)

MS. RINGOLD: MAY WE APPROACH FOR A MINUTE, YOUR HONOR?

THE COURT: SURE.

MS. RINGOLD: THANK YOU VERY MUCH.

(BENCH CONFERENCE, NOT REPORTED.)

THE COURT: BACK ON THE RECORD.

I'M GOING TO SET THIS FOR STATUS CONFERENCE ON WEDNESDAY, OCTOBER 24TH.

I'LL DEFER THE PROCEEDINGS SO THAT, MS. RINGOLD, YOU CAN LET ME KNOW WHAT, IF ANYTHING, HAS BEEN DONE IN THE COURT OF APPEAL AND HOW WE SHOULD PROCEED IF IT'S KNOWN. IF IT'S NOT KNOWN, THEN IT WON'T BE KNOWN.

I AM NOT GOING TO HOLD YOU TO ANY PARTICULAR SCHEDULE FOR PURPOSES OF CONDUCTING A *FRANKLIN* HEARING IF IN FACT THAT'S HOW THE CASE PROCEEDS. YOU CAN HAVE WHATEVER TIME YOU NEED TO GET PREPARED FOR THAT. AS I SAID, I WANT IT DONE AND I WANT IT DONE WELL, SO I'M NOT GOING TO CUT OFF YOUR OPPORTUNITY.

AND I ALSO THINK THAT THE PEOPLE NEED AN OPPORTUNITY TO PRESENT WHAT THEY WANT TO PRESENT, BECAUSE THE COURTS HAVE MADE CLEAR THAT IT'S NOT JUST THE DEFENDANT'S RIGHT, IT'S THE PEOPLE'S RIGHT ALSO. SO I AM GOING TO GIVE THE PARTIES WHATEVER TIME THEY NEED.

MS. RINGOLD: THANK YOU VERY MUCH.

MS. PETTIGREW: YOUR HONOR --

THE COURT: YES?

MS. PETTIGREW: -- WHEN WE WERE HAVING A DISCUSSION AT THE BENCH, THE COURT INDICATED THAT IT WOULD ORDER A TRANSCRIPT OF THE PROCEEDINGS --

THE COURT: RIGHT.

MS. PETTIGREW: -- FOR PETITIONER AND RESPONDENT.

THE COURT: I AM GOING TO ORDER A TRANSCRIPT OF THESE PROCEEDINGS, AN ORIGINAL AND TWO COPIES.

MS. PETTIGREW: THANK YOU.

THE COURT: JUST TODAY'S PROCEEDINGS.

MS. SPEAR: YOUR HONOR, WHEN I LEARN WHO IS GOING TO BE REASSIGNED TO THIS, I'LL LET THE COURT KNOW.

THE COURT: THANK YOU.

SOMEBODY PLEASE LET ME KNOW. ACTUALLY, LET MY ASSISTANT KNOW.

MS. RINGOLD: THANK YOU VERY MUCH.

THE COURT: THANK YOU VERY MUCH FOR YOUR TIME. I REALLY DO APPRECIATE IT.

(THE PROCEEDINGS ARE CONTINUED
TO WEDNESDAY, OCTOBER 24, 2018,
AT 8:30 A.M.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 108 HON. LISA B. LENCH, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF/RESPONDENT,

VS.

01 JOVAN MCCLENTON,

DEFENDANT/PETITIONER.

REPORTER'S CERTIFICATE NO. BA104610

I, JOYCE KATHLEEN RODELA, CSR #9878, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1 THRU 19 COMPRISE A FULL, TRUE, AND CORRECT TRANSCRIPT OF THE PROCEEDINGS AND TESTIMONY REPORTED BY ME IN THE MATTER OF THE ABOVE-ENTITLED CAUSE ON SEPTEMBER 6, 2018.

DATED THIS 6TH DAY OF SEPTEMBER, 2018.

_____, CSR #9878
JOYCE KATHLEEN RODELA, OFFICIAL REPORTER

Court of Appeal, Second Appellate District, Division Four - No. B293648

S252751

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JOVAN McCLENTON on Habeas Corpus.

The petition for review is denied.

T. Cantil-J

Chief Justice

FILED
LOS ANGELES SUPERIOR COURT

JAN 04 2013

JOHN A. CLARKE, CLERK

BY P. GUERRERO, DEPUTY

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. JOVAN McCLENTON, Defendant/Petitioner.	Case No. BA104610 ORDER TO SHOW CAUSE ON PETITION FOR WRIT OF HABEAS CORPUS

The Respondent District Attorney is ordered to show cause why the Petition for Writ of Habeas Corpus should not be granted and is ordered to file a return within 30 days of the service of this order. Cal. R. Ct. 4.551(d). The return must be served on counsel for the petitioner. In particular, Respondent is ordered to show cause why petitioner, who was sentenced on May 3, 1995 to a term of 194 years and 4 months in prison for crimes he committed as a juvenile, is not entitled to be resentenced. (See *People v. Caballero* (2012) 55 Cal. 4th 262; *People v. Argeta* (2012) 210 Cal. App. 4th 1478.) The court finds that Petitioner has not established a *prima facie* case for relief as to any other issues.

The Office of the Public Defender for Los Angeles County, which represented petitioner at trial, is appointed to represent petitioner. Cal. R. Ct. 4.551(c)(2). Petitioner may file a denial

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within 30 days after filing and service of the return. Cal. R. Ct. 4.551(e).

Unless further hearing is ordered, the matter will be deemed submitted upon receipt of petitioner's denial or after the expiration of the time for filing the denial.

January 4, 2013

LISA B. LENCH
Judge of the Superior Court

The clerk is to give notice.

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 04/22/19

CASE NO. BA104610

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: JOVAN MCCLENTON

COUNT 01: 459 PC FEL
COUNT 02: 487H(A) PC FEL
COUNT 03: 211 PC FEL
COUNT 04: 288A(D) PC FEL

ON 01/04/13 AT 900 AM IN CENTRAL DISTRICT DEPT 132

CASE CALLED FOR JUDICIAL ACTION

PARTIES: LISA B. LENCH (JUDGE) PATRICIA GUERRERO (CLERK)
NONE (REP) NONE (DDA)

DEFENDANT IS NOT PRESENT IN COURT, AND NOT REPRESENTED BY COUNSEL

ORDER TO SHOW CAUSE ON PETITION FOR WRIT OF HABEAS CORPUS IS SIGNED AND FILED.

THE RESPONDENT DISTRICT ATTORNEY IS ORDERED TO SHOW CAUSE WHY THE PETITION FOR WRIT OF HABEAS CORPUS SHOULD NOT BE GRANTED AND IS ORDERED TO FILE A RETURN WITHIN 30 DAYS OF THE SERVICE OF

THIS ORDER. THE RETURN MUST BE SERVED ON COUNSEL FOR PETITIONER. IN PARTICULAR, RESPONDENT IS ORDERED TO SHOW CAUSE WHY PETITIONER, WHO WAS SENTENCED ON MAY 3, 1995 TO A TERM OF 194 YEARS AND 4 MONTHS IN PRISON FOR CRIMES HE COMMITTED AS A JUVENILE, IS NOT ENTITLED TO BE RESENTENCED. THE COURT FINDS THAT PETITIONER HAS NOT ESTABLISHED A PRIMA FACIE CASE FOR RELIEF AS TO ANY OTHER ISSUES.

THE OFFICE OF THE PUBLIC DEFENDER FOR LOS ANGELES COUNTY, WHICH REPRESENTED PETITIONER AT TRIAL, IS APPOINTED TO REPRESENT PETITIONER. PETITIONER MAY FILE A DENIAL WITHIN 30 DAYS AFTER FILING AND SERVICE OF THE RETURN.

UNLESS FURTHER HEARING IS ORDERED, THE MATTER WILL BE DEEMED SUBMITTED UPON RECEIPT OF PETITIONER'S DENIAL OR AFTER THE

CASE NO. BA104610
DEF NO. 01

DATE PRINTED 04/22/19

EXPIRATION OF THE TIME FOR FILING THE DENIAL.

A COPY OF THE COURT'S ORDER IS FORWARDED TO THE PUBLIC DEFENDER'S OFFICE, 19TH FLOOR OF THIS BUILDING.

A COPY OF THE COURT'S ORDER IS MAILED VIA U.S. MAIL TO:

DISTRICT ATTORNEY'S OFFICE
HABEAS CORPUS LITIGATION TEAM
320 WEST TEMPLE STREET, ROOM 540
LOS ANGELES, CA 90012

AND

JOVAN MCCLENTO #J-64472
KERN VALLEY STATE PRISON B-6-C #221
P.O. BOX 5102
DELANO, CA 93216

NEXT SCHEDULED EVENT:
HABEAS CORPUS PETITION

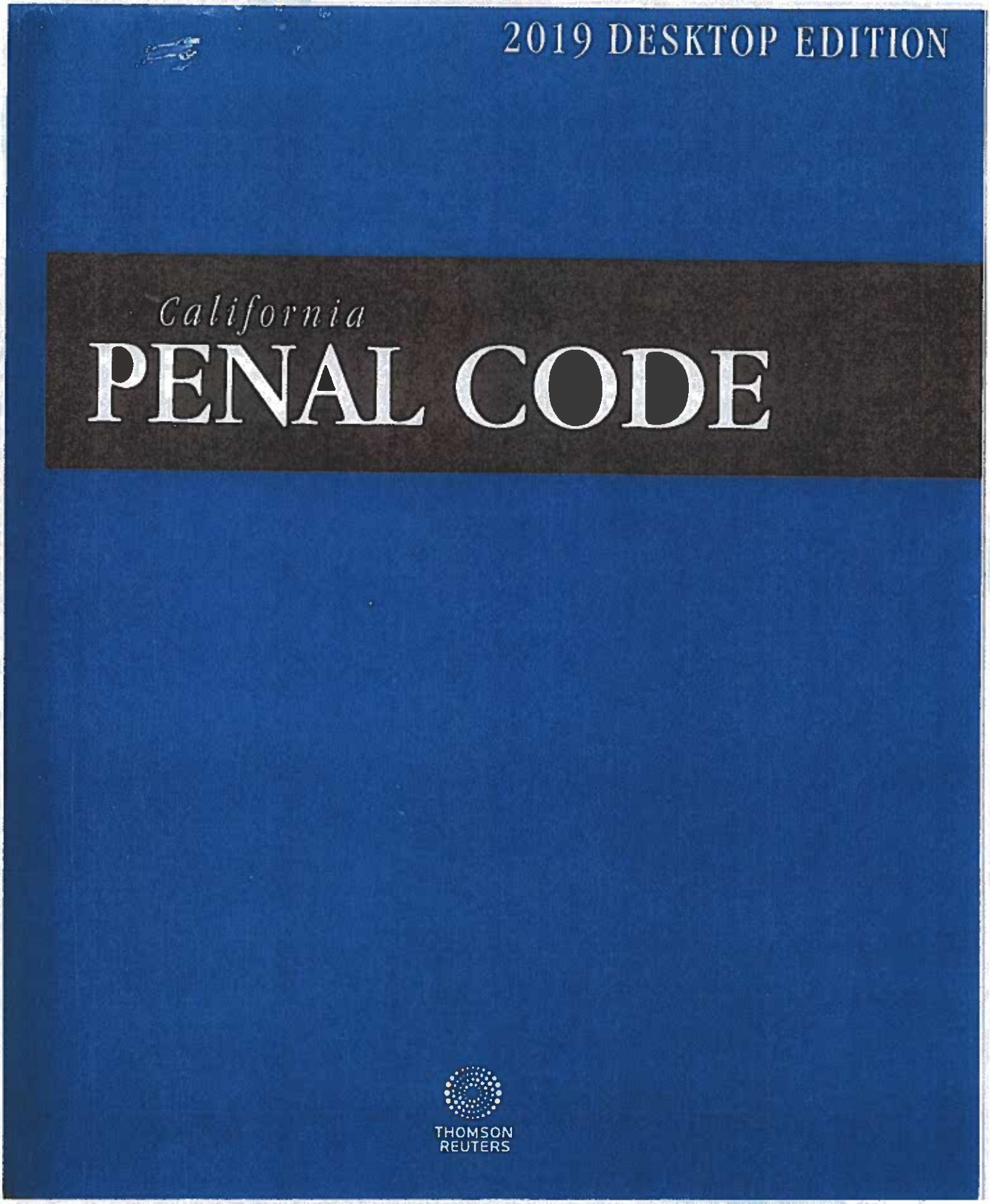
04/22/19

I HEREBY CERTIFY THIS TO BE A TRUE AND CORRECT COPY OF THE ELECTRONIC MINUTE ORDER ON FILE IN THIS OFFICE AS OF THE ABOVE DATE.

SHERRI R. CARTER ,EXECUTIVE OFFICER/CLERK OF SUPERIOR COURT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

BY _____, DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES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Appendix E

term prescribed by law. *(Added by Stats.1941, c. 106, p. 1112, § 15. Amended by Stats.1947, c. 1381, p. 2945, § 6; Stats.1949, c. 555, p. 954, § 1; Stats.1976, c. 1139, p. 5153, § 282, operative July 1, 1977.)*

Cross References

Credit on term of imprisonment, see Penal Code § 2930 et seq.
Director defined for purposes of this Part, see Penal Code § 6080.
Director of corrections, powers and duties generally, see Penal Code § 5052 et seq.
Prison or state prison defined for purposes of this Code, see Penal Code § 6081.

Research References

4 Witkin, California Criminal Law 4th Pretrial Proceedings § 316 (2012), Sentencing.
3 Witkin, California Criminal Law 4th Punishment § 735 (2012), Requirement of Minimum Period of Service.

§ 3049.5. Prisoners included in specific research program approved by board of corrections

Notwithstanding the provisions of Section 3049, any prisoner selected for inclusion in a specific research program approved by the Board of Corrections may be paroled upon completion of the diagnostic study provided for in Section 5079. The number of prisoners released in any year under this provision shall not exceed 5 percent of the total number of all prisoners released in the preceding year.

This section shall not apply to a prisoner who, while committing the offense for which he has been imprisoned, physically attacked any person by any means. A threat of attack is not a physical attack for the purposes of this section unless such threat was accompanied by an attempt to inflict physical harm upon some person. *(Added by Stats.1971, c. 1700, p. 3640, § 1. Amended by Stats.2012, c. 728 (S.B.71), § 125.)*

§ 3050. Completion of in prison drug treatment program; placement in 150-day residential aftercare program; discharge from parole supervision

(a) Notwithstanding any other provision of law, any inmate under the custody of the Department of Corrections and Rehabilitation who is not currently serving and has not served a prior indeterminate sentence or a sentence for a violent felony, a serious felony, or a crime that requires him or her to register as a sex offender pursuant to Section 290, who has successfully completed an in prison drug treatment program, upon release from state prison, shall, whenever possible, be entered into a 150-day residential aftercare drug treatment program sanctioned by the department.

(b) As a condition of parole, if the inmate successfully completes 150 days of residential aftercare treatment, as determined by the Department of Corrections and Rehabilitation and the aftercare provider, the parolee shall be discharged from parole supervision at that time. *(Formerly § 2933.4, added by Stats.2006, c. 875 (S.B.1453), § 1. Renumbered § 3050 and amended by Stats.2009-2010, 3rd Ex.Sess., c. 28 (S.B.18), § 42, eff. Jan. 25, 2010. Amended by Stats.2012, c. 728 (S.B.71), § 126.)*

Cross References

Department defined for purposes of this Part, see Penal Code § 6080.
Department of Corrections and Rehabilitation, generally, see Penal Code § 5000 et seq.
Felonies, definition and penalties, see Penal Code §§ 17, 18.
Prison or state prison defined for purposes of this Code, see Penal Code § 6081.

Research References

3 Witkin, California Criminal Law 4th Punishment § 753 (2012), Mandatory Conditions.

§ 3051. Youth offender parole hearings

(a)(1) A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was 25 years of age or younger, or was under 18 years of age as specified in paragraph (4) of subdivision (b), at the time of his or her controlling offense.

(2) For the purposes of this section, the following definitions shall apply:

(A) "Incarceration" means detention in a city or county jail, a local juvenile facility, a mental health facility, a Division of Juvenile Justice facility, or a Department of Corrections and Rehabilitation facility.

(B) "Controlling offense" means the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.

(b)(1) A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a determinate sentence shall be eligible for release on parole at a youth offender parole hearing by the board during his or her 15th year of incarceration, unless previously released pursuant to other statutory provisions.

(2) A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a life term of less than 25 years to life shall be eligible for release on parole by the board during his or her 20th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(3) A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(4) A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is life without the possibility of parole shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(c) An individual subject to this section shall meet with the board pursuant to subdivision (a) of Section 3041.

(d) The board shall conduct a youth offender parole hearing to consider release. At the youth offender parole hearing, the board shall release the individual on parole as provided in Section 3041, except that the board shall act in accordance with subdivision (c) of Section 4801.

(e) The youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release. The board shall review and, as necessary, revise existing regulations and adopt new regulations regarding determinations of suitability made pursuant to this section, subdivision (c) of Section 4801, and other related topics, consistent with relevant case law, in order to provide that meaningful opportunity for release.

(f)(1) In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, shall be administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of youth as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual.

(2) Family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime may submit statements for review by the board.

(3) This section is not intended to alter the rights of victims at parole hearings.

(g) If parole is not granted, the board shall set the time for a subsequent youth offender parole hearing in accordance with paragraph (3) of subdivision (b) of Section 3041.5. In exercising its discretion pursuant to paragraph (4) of subdivision (b) and subdivision (d) of Section 3041.5, the board shall consider the factors in subdivision (c) of Section 4801. A subsequent youth offender parole hearing shall not be necessary if the offender is released pursuant to other statutory provisions prior to the date of the subsequent hearing.

(h) This section shall not apply to cases in which sentencing occurs pursuant to Section 1170.12, subdivisions (b) to (i), inclusive, of Section 667, or Section 667.61, or to cases in which an individual is sentenced to life in prison without the possibility of parole for a controlling offense that was committed after the person had attained 18 years of age. This section shall not apply to an individual to whom this section would otherwise apply, but who, subsequent to attaining 26 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison.

(i)(1) The board shall complete all youth offender parole hearings for individuals who became entitled to have their parole suitability considered at a youth offender parole hearing prior to the effective date of the act that added paragraph (2) by July 1, 2015.

(2)(A) The board shall complete all youth offender parole hearings for individuals who were sentenced to indeterminate life terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by July 1, 2017.

(B) The board shall complete all youth offender parole hearings for individuals who were sentenced to determinate terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by July 1, 2021. The board shall, for all individuals described in this subparagraph, conduct the consultation described in subdivision (a) of Section 3041 before July 1, 2017.

(3)(A) The board shall complete all youth offender parole hearings for individuals who were sentenced to indeterminate life terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by January 1, 2020.

(B) The board shall complete all youth offender parole hearings for individuals who were sentenced to determinate terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by January 1, 2022. The board shall, for all individuals described in this subparagraph, conduct the consultation described in subdivision (a) of Section 3041 before January 1, 2019.

(4) The board shall complete, by July 1, 2020, all youth offender parole hearings for individuals who were sentenced to terms of life without the possibility of parole and who are or will be entitled to have their parole suitability considered at a youth offender parole hearing before July 1, 2020. *(Added by Stats.2013, c. 312 (S.B.260), § 4. Amended by Stats.2015, c. 471 (S.B.261), § 1, eff. Jan. 1, 2016; Stats.2017, c. 675 (A.B.1308), § 1, eff. Jan. 1, 2018; Stats.2017, c. 684 (S.B.394), § 1.5, eff. Jan. 1, 2018.)*

Research References

3 Witkin, California Criminal Law 4th Punishment § 511 (2012), Defendant Under Age 18.
3 Witkin, California Criminal Law 4th Punishment § 751A (2012), (New) Youth Offender Parole Hearing.

§ 3051.1. Youth offenders sentenced to indeterminate and determinate terms; dates by which parole hearings must be completed

(a) Notwithstanding subdivision (i) of Section 3051, the board shall complete all youth offender parole hearings for individuals who were sentenced to indeterminate life terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added subparagraph (A) of paragraph (2) of subdivision (i) of Section 3051 by January 1, 2018.

(b) Notwithstanding subdivision (i) of Section 3051, the board shall complete all youth offender parole hearings for individuals who were sentenced to determinate terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added subparagraph (B) of paragraph (2) of subdivision (i) of Section 3051 by December 31, 2021. The board shall, for all individuals described in this subdivision, conduct the consultation described in subdivision (a) of Section 3041 before January 1, 2018. *(Added by Stats.2015, c. 472 (S.B.519), § 1, eff. Jan. 1, 2016.)*

§ 3052. Rules and regulations; establishment; enforcement

The Board of Parole Hearings shall have the power to establish and enforce rules and regulations under which inmates committed to state prisons may be allowed to go upon parole outside the prison buildings and enclosures when eligible for parole. *(Added by Stats.1941, c. 106, p. 1112, § 15. Amended by Stats.1957, c. 2256, p. 3935, § 61; Stats.1977, c. 165, p. 669, § 53, eff. June 29, 1977, operative July 1, 1977; Stats.1983, c. 757, § 1; Stats.2015, c. 470 (S.B.230), § 12, eff. Jan. 1, 2016.)*

Cross References

Prison or state prison defined for purposes of this Code, see Penal Code § 6081.
Rules and regulations for state agencies, see Government Code § 11342.1 et seq.

Research References

3 Witkin, California Criminal Law 4th Punishment § 731 (2012), Board of Parole Hearings.

§ 3053. Conditions; examination or test for tuberculosis

(a) The Board of Prison Terms upon granting any parole to any prisoner may also impose on the parole any conditions that it may deem proper.

(b) The Board of Prison Terms may impose as a condition of parole that any prisoner granted parole undergo an examination or test for tuberculosis when the board reasonably suspects that the parolee has, has had, or has been exposed to, tuberculosis in an infectious stage.

(c) For purposes of this section, an "examination or test for tuberculosis" means testing and followup examinations or treatment according to the Centers for Disease Control and American Thoracic Society recommendations in effect at the time of the initial examination. *(Added by Stats.1941, c. 106, p. 1112, § 15. Amended by Stats.1944, 3rd Ex.Sess., c. 2, p. 29, § 41; Stats.1977, c. 165, p. 669, § 54, eff. June 29, 1977, operative July 1, 1977; Stats.1979, c. 255, p. 561, § 24; Stats.1992, c. 1263 (A.B.3467), § 1.)*

Cross References

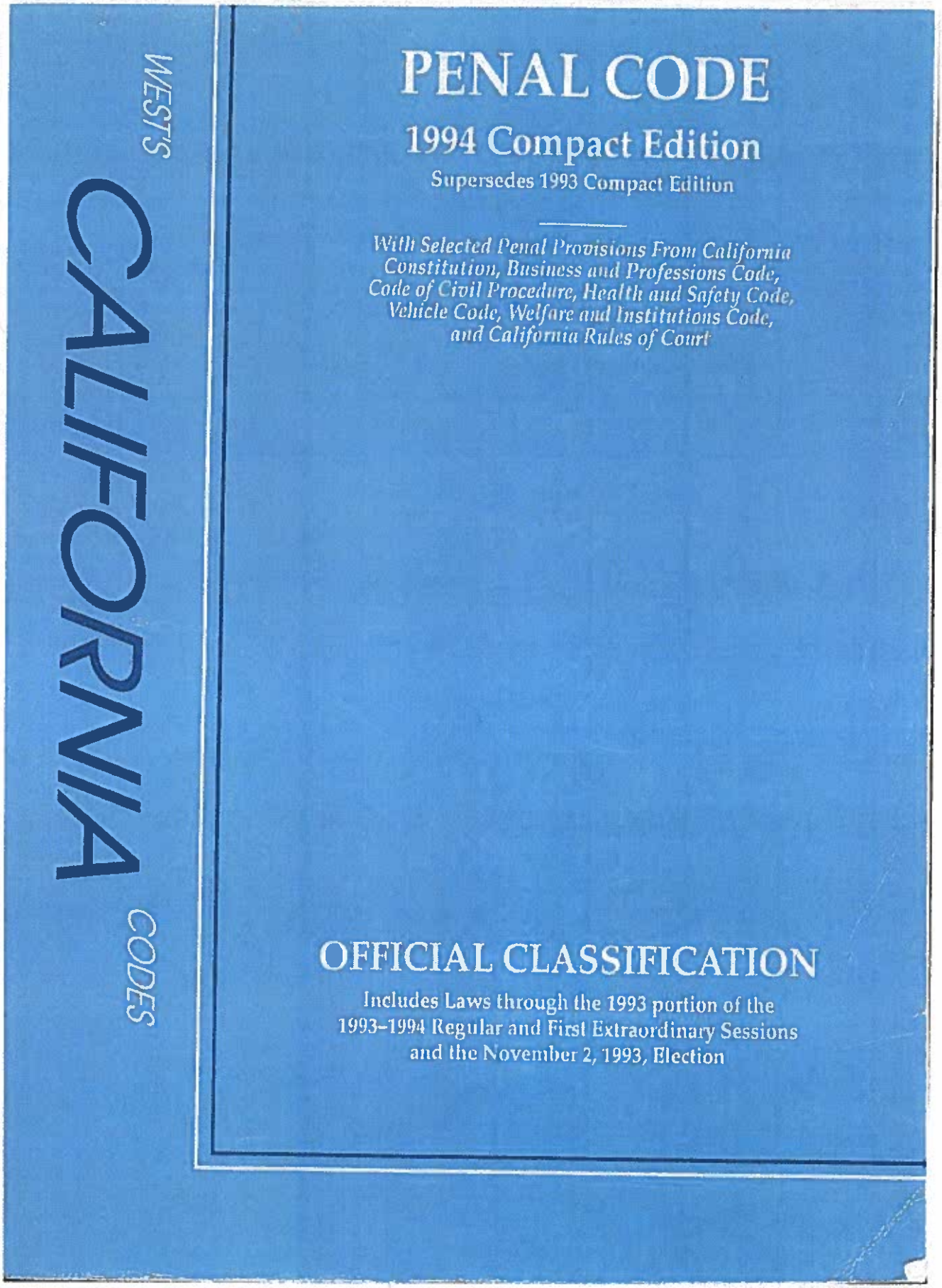
Imposition of conditions for probation, see Penal Code § 1203.1.
Prison or state prison defined for purposes of this Code, see Penal Code § 6081.
Tuberculosis examination requirements, see Penal Code § 6007.

Research References

3 Witkin, California Criminal Law 4th Punishment § 752 (2012), Discretionary Conditions.

§ 3053.2. Conviction of domestic violence offense; parole conditions; notice to victim

(a) Upon the request of the victim, or the victim's parent or legal guardian if the victim is a minor, the Board of Parole Hearings or the supervising parole agency shall impose the following condition on the


WEST'S
CALIFORNIA
CODES
PENAL CODE
1994 Compact Edition
Supersedes 1993 Compact Edition
With Selected Penal Provisions From California Constitution, Business and Professions Code, Code of Civil Procedure, Health and Safety Code, Vehicle Code, Welfare and Institutions Code, and California Rules of Court
OFFICIAL CLASSIFICATION
Includes Laws through the 1993 portion of the 1993–1994 Regular and First Extraordinary Sessions and the November 2, 1993, Election

Section
1170.1. Two or more felony convictions; consecutive term; aggregate term; enhancements; kidnapping; felony while imprisoned or subject to reimprisonment for escape; additional term; sex offenses, robbery, or burglary; mitigating circumstances.
1170.1a. Renumbered.
1170.1b. Repealed.
1170.13. Credible threat to use force or violence upon witness, victim or immediate family; punishment.
1170.15. Multiple felony convictions, including attempt to dissuade witness.
1170.2. Felonies committed prior to July 1, 1977; determination of term of imprisonment; parole; release; hearing.
1170.3. Rules for uniformity in sentencing; criteria for consideration by judge; content and presentation of material in probation officer reports.
1170.4. Sentencing practices information; collection and analysis; rules use.
1170.5. Annual sentencing institutes.
1170.6. Review and analysis of statutory sentences and operation of existing criminal penalties; report.
1170.7. Robbery of pharmacist, etc., to obtain controlled substance; aggravation of crime.
1170.71. Lewd or lascivious acts with child under age 14; use of obscene or harmful matter; aggravation of crime.
1170.72. Crimes involving minors under 11 years of age; circumstance in aggravation.
1170.73. Controlled substances; quantity; aggravated term.
1170.74. Felony offenses involving crystalline form of methamphetamine; aggravation of crime.
1170.75. Felony attempted or committed because of victim's race, color, religion, nationality, or country of origin; aggravation of crime.
1170.78. Arson; retaliation against owner or occupant; aggravation of crime.
1170.8. Arson, robbery, or assault in places of worship; aggravation of crime.
1170.81. Attempted life term crimes; peace officers as victims; aggravation of punishment.
1170.82. Inoperative.
1170.84. Tying, binding or confining of victim; aggravation of crime.
1170.85. Felony assault or battery against witness or person providing information to officer or prosecutor; aggravation of punishment.
1170.9. Vietnam veterans convicted of felony; commitment to federal incarceration.
1170.95. Limitation on total subordinate terms for consecutive residential burglary offenses.
1171, 1172. Repealed.

§ 1170. Determinate sentencing

(a) (1) The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.

(2) In any case in which the punishment prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison of 16 months, two or three years; two, three, or four years; two, three, or five years; three, four, or five years; two, four, or six years; three, four, or six years; three, five, or seven years; three, six, or eight years; five, seven, or nine years; five, seven, or 11 years, or any other specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified unless such convicted person is given any other disposition provided by law, including a fine, jail, probation, or the suspension of imposition or execution of sentence or is sentenced pursuant to subdivision (b) of Section 1168 because he or she had committed his or her crime prior to July 1, 1977. In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council. The court, unless it determines that there are circumstances in mitigation of the punishment prescribed, shall also impose any other term which it is required by law to impose as an additional term. Nothing in this article shall affect any provision of law which imposes the death penalty, which authorizes or restricts the granting of probation or suspending the execution or imposition of sentence, or expressly provides for imprisonment in the state prison for life. In any case in which the amount of preimprisonment credit under Section 2900.5 or any other provision of law is equal to or exceeds any sentence imposed pursuant to this chapter, the entire sentence, including any period of parole under Section 3000, shall be deemed to have been served and the defendant shall not be actually delivered to the custody of the Director of Corrections. However, any such sentence shall be deemed a separate prior prison term under Section 667.5, and a copy of the judgment and other necessary documentation shall be forwarded to the Director of Corrections.

(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts. In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under Section 667.5, 1170.1, 12022, 12022.4, 12022.5, 12022.6, or 12022.7 or under any other section of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.

(c) The court shall state the reasons for its sentence choice on the record at the time of sentencing. The court shall also inform the defendant that as part of the sentence after expiration of the term he or she may be on parole for a period as provided in Section 3000.

(d) When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison and has been committed to the custody of the Director of Corrections, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the Director of Corrections or the Board of Prison Terms, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The resentence under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served.

(e) Any sentence imposed under this article shall be subject to the provisions of Sections 3000 and 3057 and any other applicable provisions of law.

• • •

(f) A sentence to state prison for a determinate term for which only one term is specified, is a sentence to state prison under this section. *(Added by Stats.1976, c. 1139, p. 5140, § 273, operative July 1, 1977. Amended by Stats.1977, c. 165, p. 647, § 15, eff. June 29, 1977, operative July 1, 1977; Stats.1978, c. 579, p. 1987, § 29; Stats.1979, c. 255, p. 549, § 8; Stats.1980, c. 676, p. 1984, § 251; Stats.1980, c. 1117, p. 3595, § 7; Stats.1981, c. 1111, p. 4332, § 1; Stats.1984, c. 1432, § 9; Stats.1985, c. 463, § 2; Stats.1985, c. 1108, § 2; Stats.1987, c. 1423, § 2; Stats.1988, c. 635, § 1; Stats.1992, c. 695 (S.B.97), § 10, eff. Sept. 15, 1992.)*

Cross References

Habitual offender, punishment, see § 667.7.
Kidnapping, multiple offenses or victims, see § 1170.1.
Life sentence ordered to run consecutive to determinate term imposed under this section, term served first and credit toward parole, see § 669.
Parole conditions, return to county other than that from which convicted, see § 3003.
Probation, see § 1203.
Release of persons convicted of violent felonies, notification of certain local law enforcement officials, see § 3058.6.
Sentence to include period of parole unless waived, see § 3000.

§ 1170.1. Two or more felony convictions; consecutive term; aggregate term; enhancements; kidnapping; felony while imprisoned or subject to reimprisonment for escape; additional term; sex offenses, robbery, or burglary; mitigating circumstances

(a) Except as provided in subdivision (c) and subject to Section 654, when any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a different court, and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed pursuant to Section 667, 667.5, 667.6, or 12022.1, and pursuant to Section 11370.2 of the Health and Safety Code. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any enhancements imposed pursuant to Section 667.15, 667.8, 667.85, 12022, 12022.2, 12022.3, 12022.4, 12022.5, 12022.55, 12022.6, 12022.7, 12022.75, 12022.8, or 12022.9 and an enhancement imposed pursuant to Section 11370.4 or 11379.8 of the Health and Safety Code. The subordinate term for each consecutive offense which is not a "violent felony" as defined in subdivision (c) of Section 667.5 shall consist of one-third of the middle term of imprisonment prescribed for each other • • • felony conviction for an offense that is not a violent felony for which a consecutive term of imprisonment is imposed, and shall exclude any enhancements. In no case shall the total of subordinate terms for these consecutive offenses which are not "violent felonies" as defined in subdivision (c) of Section 667.5 exceed five years. The subordinate term for each consecutive offense which is a "violent felony" as defined in subdivision (c) of Section 667.5, including those offenses described in paragraph (8), (9), or (17) of subdivision (c) of Section 667.5, shall consist of one-third of the middle term of imprisonment prescribed for each other • • • felony conviction for an offense that is a violent felony for which a consecutive term of imprisonment is imposed, and shall include one-third of any enhancements imposed pursuant to Section 667.15, 667.8, 667.85, 12022, 12022.2, 12022.4, 12022.5, 12022.55, 12022.7, 12022.75, or 12022.9.

(b)(1) When a consecutive term of imprisonment is imposed under Sections 669 and 1170 for two or more convictions for kidnapping, as defined in Section 207, involving • • • separate victims • • • or the same victim on separate occasions, the aggregate term shall be calculated as provided in subdivision (a), except that the subordinate term for each subsequent kidnapping conviction shall consist of the middle term for each kidnapping conviction for which a consecutive term of imprisonment is imposed and shall include one-third of any enhancements imposed pursuant to Section 667.8, 667.85, 12022, 12022.2, 12022.4, 12022.5, 12022.55, 12022.7, 12022.75, or 12022.9. The five-year limitation on the total of subordinate terms provided in subdivision (a) shall not apply to subordinate terms for second and subsequent convictions of kidnapping, as defined in Section 207, involving separate victims • • • or the same victim on separate occasions.

(2) As used in this subdivision, "separate occasion" means the defendant committed a second violation of Section 207 involving the same victim after at least 24 hours elapsed following his or her release of the victim.

(c) In the case of any person convicted of one or more felonies committed while the person is confined in a state prison, or is subject to reimprisonment for escape from • • • custody and the law either requires the terms to be served consecutively or the court imposes consecutive terms, the term of imprisonment for all the convictions which the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison. If the new offenses are consecutive with each other, the principal and subordinate terms shall be calculated as provided in subdivision (a), except that the total of subordinate terms may exceed five years. This subdivision shall be applicable in cases of convictions of more than one offense in different proceedings, and convictions of more than one offense in the same or different proceedings.

(d) When the court imposes a prison sentence for a felony pursuant to Section 1170 the court shall also impose the additional terms provided in Sections 667, 667.15, 667.5, 667.8, 667.85, 12022, 12022.1, 12022.2, 12022.4, 12022.5, 12022.55, 12022.6, 12022.7, 12022.75, and 12022.9, and the additional terms provided in Section 11370.2, 11370.4, or 11379.8 of the Health and Safety Code, unless the additional punishment therefor is stricken pursuant to subdivision (h). The court shall also impose any other additional term which the court determines in its discretion or as required by law shall run consecutive to the term imposed under Section 1170. In considering the imposition of the additional term, the court shall apply the sentencing rules of the Judicial Council.

(e) When two or more enhancements under Sections 12022, 12022.4, 12022.5, 12022.55, 12022.7, and 12022.9 may be imposed for any single offense, only the greatest enhancement shall apply • • •. However, in cases of lewd or lascivious acts upon or with a child under the age of 14 years accomplished by means of force or fear, as described in Section 288, kidnapping, as defined in Section 207, sexual battery, as defined in Section 243.4, penetration of a genital or anal opening by a foreign object, as defined in Section 289, oral copulation, sodomy, robbery, carjacking, rape or burglary, or attempted lewd or lascivious acts upon or with a child under the age of 14 years accomplished by means of force or fear, kidnapping, sexual battery, penetration of a genital or anal opening by a foreign object, oral copulation, sodomy, robbery, carjacking, rape, murder, or burglary the court may impose both (1) one enhancement for weapons as provided in either Section 12022, 12022.4, or subdivision (a) of, or paragraph (2) of subdivision (b) of, Section 12022.5 and (2) one enhancement for great bodily injury as provided in either Section 12022.7 or 12022.9.

(f) The enhancements provided in Sections 667, 667.15, 667.5, 667.6, 667.8, 667.85, 12022, 12022.1, 12022.2, 12022.3,

12022.4, 12022.5, 12022.55, 12022.6, 12022.7, 12022.75, 12022.8, and 12022.9, and in Section 11370.2, 11370.4, or 11379.8 of the Health and Safety Code, shall be pleaded and proven as provided by law.

(g)(1) The term of imprisonment shall not exceed twice the number of years imposed by the trial court as the base term pursuant to subdivision (b) of Section 1170, unless the defendant stands convicted of a "violent felony" as defined in subdivision (c) of Section 667.5, or a consecutive sentence is being imposed pursuant to subdivision (b) or (c) of this section, or an enhancement is imposed pursuant to Section 667, 667.15, 667.5, 667.8, 667.85, 12022, 12022.2, 12022.4, 12022.5, 12022.55, 12022.6, 12022.7, 12022.75, or 12022.9, or an enhancement is being imposed pursuant to Section 11370.2, 11370.4, or 11379.8 of the Health and Safety Code, or the defendant stands convicted of felony escape from an institution in which he or she is lawfully confined.

(2) The term of imprisonment shall not exceed twice the number of years imposed by the trial court as the base term pursuant to subdivision (b) of Section 1170 unless an enhancement is imposed pursuant to Section 12022.1 and both the primary and secondary offenses specified in Section 12022.1 are serious felonies as specified in subdivision (c) of Section 1192.7.

(h) Notwithstanding any other * * * law, the court may strike the additional punishment for the enhancements provided in Sections 667.15, 667.5, 667.8, 667.85, 12022, 12022.1, 12022.2, 12022.4, 12022.6, 12022.7, 12022.75, and 12022.9, or the enhancements provided in Section 11370.2, 11370.4, or 11379.8 of the Health and Safety Code, if it determines that there are circumstances in mitigation of the additional punishment and states on the record its reasons for striking the additional punishment.

(i) For any violation of paragraph (2) or (3) of subdivision (a) of Section 261, Section 264.1, subdivision (b) of Section 288, subdivision (a) of Section 289, or sodomy or oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person as provided in Section 286 or 288a, the number of enhancements which may be imposed shall not be limited, regardless of whether the enhancements are pursuant to this or some other section of law. Each of the enhancements shall be a full and separately served enhancement and shall not be merged with any term or with any other enhancement. *(Formerly § 1170.1a, added by Stats.1976, c. 1139, p. 5140, § 273, operative July 1, 1973. Renumbered § 1170.1 and amended by Stats.1977, c. 165, p. 649, § 17, eff. June 29, 1977, operative July 1, 1977; Stats.1979, c. 944, p. 3259, § 12; Stats.1980, c. 132, p. 305, § 2, eff. May 29, 1980; Stats.1980, c. 1117, p. 3597, § 8; Stats.1982, c. 1515, p. 5876, § 1, eff. Sept. 30, 1982; Stats.1982, c. 1551, p. 6048, § 1.5. Amended by Stats. 1985, c. 463, § 3; Stats.1985, c. 1375, § 2.5; Stats.1986, c. 248, § 162; Stats.1986, c. 1299, § 10; Stats.1986, c. 1429, § 1; Stats.1987, c. 611, § 2; Stats.1987, c. 706, § 3; Stats.1987, c. 828, § 66; Stats.1987, c. 939, § 1; Stats.1987, c. 1423, § 3.7; Stats.1988, c. 1484, § 3; Stats.1988, c. 1487, § 2; Stats.1989, c. 1044, § 1; Stats.1990, c. 41 (A.B.664), § 2; Stats.1990, c. 835 (A.B.2655), § 1; Stats.1992, c. 235 (A.B.2351), § 1; Stats.1993, c. 315 (A.B.41), § 1; Stats.1993, c. 591 (A.B.25), § 3; Stats. 1993, c. 592 (A.B.1330), § 4; Stats.1993, c. 610 (A.B.6), § 15, eff. Oct. 1, 1993; Stats.1993, c. 610 (A.B.6), § 15.98, eff. Oct. 1, 1993, operative Jan. 1, 1994; Stats.1993, c. 611 (S.B.60), § 17, eff. Oct. 1, 1993; Stats.1993, c. 611 (S.B.60), § 17.98, eff. Oct. 1, 1993, operative Jan. 1, 1994.)*

Cross References

Commencement of second term of imprisonment for escape from state prison, see § 4530.
Determinate sentencing, see § 1170.
Imposition of consecutive sentence, see § 669.
Life sentence ordered to run consecutive to determinate term imposed under this section, term served first and credit toward parole, see § 669.
Punishment for escape,
Generally, see § 4530.
Consecutive terms not subject to reduction, see § 4532.
Sex offenses, full, separate, and consecutive term of imprisonment in lieu of term provided in this section, see § 667.6.

§ 1170.1a. Renumbered § 1170.1 and amended by Stats. 1977, c. 165, p. 619, § 17, eff. June 29, 1977, operative July 1, 1977

§ 1170.1b. Repealed by Stats.1977, c. 165, p. 650, § 17.5, eff. June 29, 1977, operative July 1, 1977

§ 1170.13. Credible threat to use force or violence upon witness, victim or immediate family; punishment

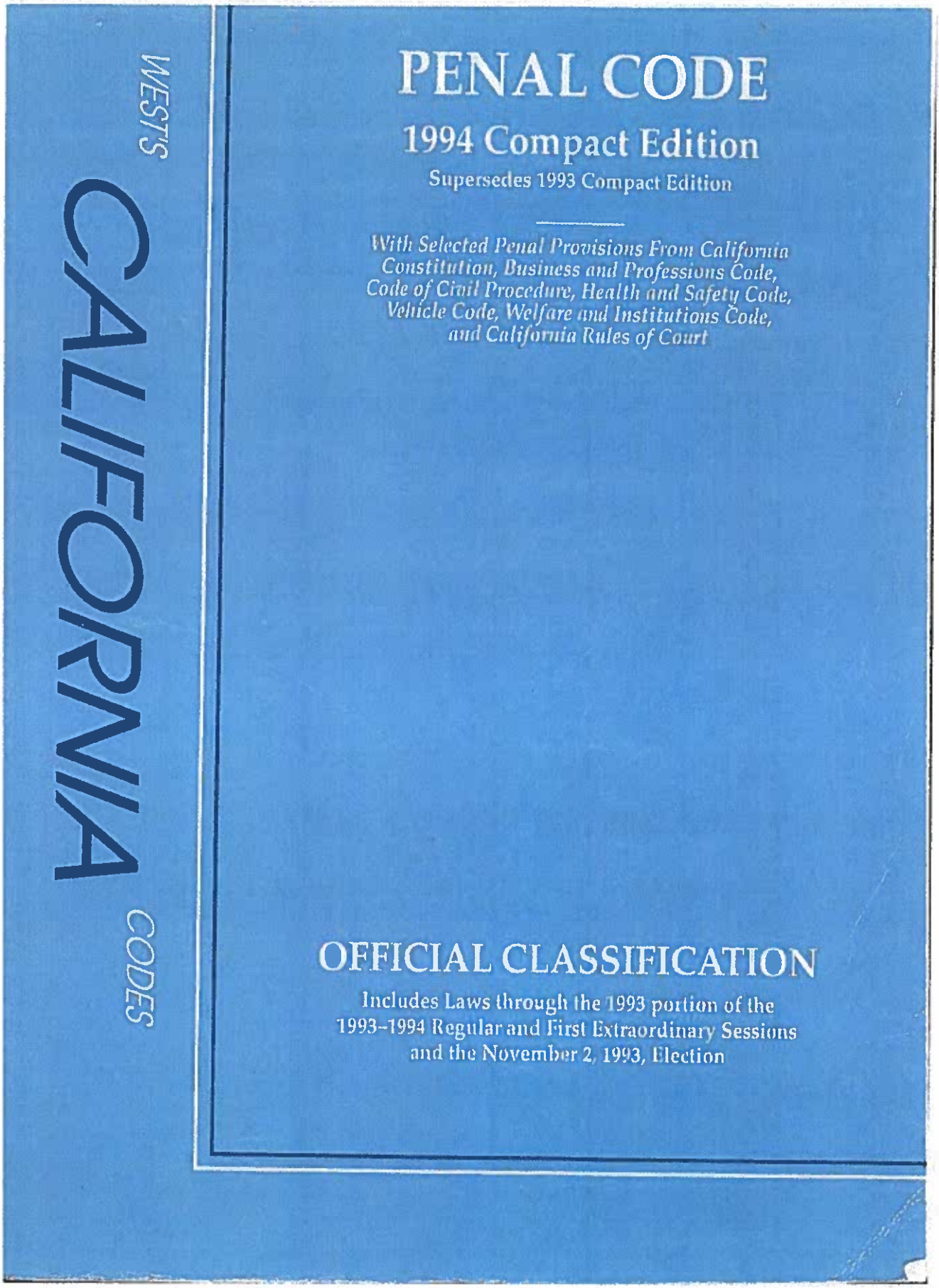
(a) Notwithstanding * * * subdivision (a) of Section 1170.1 which provides for the imposition of a subordinate term for a consecutive offense of one-third of the middle term of imprisonment, if a person is convicted pursuant to subdivision (b) of Section 139, the subordinate term for each consecutive offense shall consist of 100 percent of the middle term. The total term of imprisonment imposed pursuant to this subdivision may exceed five years, but shall not exceed 15 years.

(b) Notwithstanding * * * subdivision (c) of Section 1170.1, whenever a person is convicted pursuant to subdivision (b) of Section 139 while the person is confined in a state prison, or is subject to reimprisonment for escape from * * * custody, the term of imprisonment for all those convictions which the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison. Punishment for the new offenses shall be calculated as provided in subdivision (a) of this section, except that the total term of imprisonment imposed may exceed 15 years.

(c) Notwithstanding subdivision (g) of Section 1170.1, a term of imprisonment imposed pursuant to this section may exceed twice the number of years imposed by the trial court as a base term pursuant to subdivision (b) of Section 1170. *(Added by Stats.1989, c. 1378, § 4. Amended by Stats.1993, c. 553 (A.B.106), § 1.)*

§ 1170.15. Multiple felony convictions, including attempt to dissuade witness

Notwithstanding the provisions of subdivision (a) of Section 1170.1 which provide for the imposition of a subordinate term for a consecutive offense of one-third of the middle term of imprisonment, if a person is convicted of a felony, and of an additional felony which is a violation of Section 136.1 or 137 and which was committed against the victim of, or a witness or potential witness with respect to, or a person who was about to give material information pertaining to, the first felony, or of a felony violation of Section 653f which was committed to dissuade a witness or potential witness to the first felony, the subordinate term for each consecutive offense which is a felony described in this section shall consist of 100 percent of the middle term of imprisonment for the felony for which a consecutive term of imprisonment is imposed, and shall include 100 percent of any enhancements imposed pursuant to Section 12022, 12022.5 or 12022.7. A term of imprisonment imposed pursuant to this section may exceed twice the number of years imposed by the trial court as a base term pursuant to


WEST'S
CALIFORNIA
CODES
PENAL CODE
1994 Compact Edition
Supersedes 1993 Compact Edition
With Selected Penal Provisions From California Constitution, Business and Professions Code, Code of Civil Procedure, Health and Safety Code, Vehicle Code, Welfare and Institutions Code, and California Rules of Court
OFFICIAL CLASSIFICATION
Includes Laws through the 1993 portion of the 1993–1994 Regular and First Extraordinary Sessions and the November 2, 1993, Election

defendant remains subject to reimprisonment for escape from custody or is reimprisoned on revocation of parole. The additional penalties provided for prior prison terms shall not be imposed unless they are charged and admitted or found true in the action for the new offense.

(e) The additional penalties provided for prior prison terms shall not be imposed for any felony for which the defendant did not serve a prior separate term in state prison.

(f) A prior conviction of a felony shall include a conviction in another jurisdiction for an offense which, if committed in California, is punishable by imprisonment in the state prison if the defendant served one year or more in prison for the offense in the other jurisdiction. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense which includes all of the elements of the particular felony as defined under California law if the defendant served one year or more in prison for the offense in the other jurisdiction.

(g) A prior separate prison term for the purposes of this section shall mean a continuous completed period of prison incarceration imposed for the particular offense alone or in combination with concurrent or consecutive sentences for other crimes, including any reimprisonment on revocation of parole which is not accompanied by a new commitment to prison, and including any reimprisonment after an escape from incarceration.

(h) Serving a prison term includes any confinement time in any state prison or federal penal institution as punishment for commission of an offense, including confinement in a hospital or other institution or facility credited as service of prison time in the jurisdiction of the confinement.

(i) For the purposes of this section, a commitment to the State Department of Mental Health as a mentally disordered sex offender following a conviction of a felony, which commitment exceeds one year in duration, shall be deemed a prior prison term.

(j) For the purposes of this section, when a person subject to the custody, control, and discipline of the Director of Corrections is incarcerated at a facility operated by the Department of the Youth Authority, that incarceration shall be deemed to be a term served in state prison.

(k) Notwithstanding subdivisions (d) and (g) or any other provision of law, where one of the new offenses is committed while the defendant is temporarily removed from prison pursuant to Section 2690 or while the defendant is transferred to a community facility pursuant to Section 3416, 6253, or 6263, or while the defendant is on furlough pursuant to Section 6254, the defendant shall be subject to the full enhancements provided for in this section.

This subdivision shall not apply when a full, separate, and consecutive term is imposed pursuant to any other provision of law. *(Added by Stats.1976, c. 1139, p. 5137, § 268, operative July 1, 1977. Amended by Stats.1977, c. 2, p. 4, § 1, urgency, eff. Dec. 16, 1976, operative July 1, 1977; Stats.1977, c. 165, p. 644, § 13, urgency, eff. June 29, 1977, operative July 1, 1977; Stats.1980, c. 587, p. 1596, § 3; Stats.1983, c. 229, § 1; Stats.1985, c. 402, § 1; Stats.1986, c. 645, § 1; Stats.1987, c. 611, § 1; Stats.1988, c. 70, § 1; Stats.1988, c. 89, § 1.5; Stats.1988, c. 432, § 1; Stats.1988, c. 1484, § 1; Stats.1988, c. 1487, § 1.1; Stats.1989, c. 1012, § 1; Stats.1990, c. 18 (A.B. 662), § 1; Stats.1991, c. 451 (A.B.1393), § 1; Stats.1993, c. 162 (A.B.112), § 3; Stats.1993, c. 298 (A.B.31), § 2; Stats.1993, c. 610 (A.B.6), § 10, eff. Oct. 1, 1993; Stats.1993, c. 611 (S.B.60), § 11, eff. Oct. 1, 1993.)*

Cross References

Aliens convicted of violent felony, referral to United States immigration and naturalization service, see § 5025.
Arson of structure or forest land, enhancement in lieu of enhancement under this section, see § 451.
Bail schedule, alleged facts requiring assignment of additional bail in adoption of uniform countywide schedule, see § 1269b.
Commission of violent felony upon particular private property, entry by convicted person on such property, trespass constituting misdemeanor, see § 602.
Determinate sentencing, see § 1170.
Felonies committed prior to July 1, 1977, determination of term of imprisonment, parole, release, hearing, see § 1170.2.
Habitual offender, punishment, see § 667.7.
Limitation on application of this section, see § 1170.1.
Parole violators, placement in special facilities, application to persons convicted under this section, see § 2910.5.
Release of persons convicted of violent felonies, notification of local officials, see § 3058.6.
Release on own recognizance,
Report, violation of this section, see § 1318.1.
Violent felony as described in this section, hearing, see § 1319.
Sentence enhancements for persons with certain prior convictions, see § 1170.2.
Sentence served by preimprisonment credit deemed separate prior prison term, see § 1170.
Sex offenders who have served two or more prior prison terms as defined in this section for sex offenses, enhancement of term for conviction of additional identical sex offense, see § 667.6.
Transfer of persons committed to youth authority for study, diagnosis and treatment, see Welfare and Institutions Code § 1755.5.

§ 667.51. Lewd or lascivious acts with child under age 14; enhancement for prior convictions; term of imprisonment; release on parole

(a) Any person who is found guilty of violating Section 288 shall receive a five-year enhancement for a prior conviction of an offense listed in subdivision (b) provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of 10 years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction.

(b) Section 261, 264.1, 285, 286, 288, 288a, 288.5, or 289.

(c) Section 261, 264.1, 286, 288, 288a, 288.5, or 289.

(d) A violation of Section 288 by a person who has been previously convicted two or more times of an offense listed in subdivision (c) is punishable as a felony by imprisonment in the state prison for 15 years to life. However, if the two or more prior convictions were for violations of Section 288, this subdivision is applicable only if the current violation or at least one of the prior convictions is for an offense other than a violation of subdivision (a) of Section 288. For purposes of this subdivision, a prior conviction is required to have been for charges brought and tried separately. The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall apply to reduce any minimum term in a state prison imposed pursuant to this section, but such person shall not otherwise be released on parole prior to such time. *(Added by Stats.1981, c. 1064, p. 4093, § 2. Amended by Stats.1986, c. 1426, § 1; Stats.1989, c. 1402, § 6.)*

Cross References

Bail schedule, alleged facts requiring assignment of additional bail in adoption of uniform countywide schedule, see § 1269b.

§ 667.6. Prior sex offenses; enhancement of prison terms for new offenses; consecutive terms for certain offenses; additional fine for victim-witness assistance fund; test for determining whether crimes against single victim were committed on separate occasions

(a) Any person who is found guilty of violating paragraph (2), (3), or (7) of subdivision (a) of Section 261, Section 264.1,

subdivision (b) of Section 288, Section 288.5 * * * or 289, of committing sodomy in violation of subdivision (k) of Section 286, of committing oral copulation in violation of subdivision (k) of Section 288a, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person who has been convicted previously of any of those offenses shall receive a five-year enhancement for each of those prior convictions provided that no enhancement shall be imposed under this subdivision for any conviction occurring prior to a period of 10 years in which the person remained free of both prison custody and the commission of an offense which results in a felony conviction. In addition to the five-year enhancement imposed under this subdivision, the court also may * * * impose a fine not to exceed twenty thousand dollars ($20,000) for anyone sentenced under these provisions. The fine imposed and collected pursuant to this subdivision shall be deposited in the Victim-Witness Assistance Fund to be available for appropriation to fund child sexual exploitation and child sexual abuse victim counseling centers and prevention programs established pursuant to Section 13837.

(b) Any person convicted of an offense specified in subdivision (a) who has served two or more prior prison terms as defined in Section 667.5 for any offense specified in subdivision (a), shall receive a 10-year enhancement for each of those prior terms provided that no additional enhancement shall be imposed under this subdivision for any prison term served prior to a period of 10 years in which the person remained free of both prison custody and the commission of an offense which results in a felony conviction. In addition to the 10-year enhancement imposed under this subdivision, the court also may * * * impose a fine not to exceed twenty thousand dollars ($20,000) for any person sentenced under this subdivision. The fine imposed and collected pursuant to this subdivision shall be deposited in the Victim-Witness Assistance Fund to be available for appropriation to fund child sexual exploitation and child sexual abuse victim counseling centers and prevention programs established pursuant to Section 13837.

(c) In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of Section 220, other than an assault with intent to commit mayhem, provided that the person has been convicted previously of violating Section 220 for an offense other than an assault with intent to commit mayhem, paragraph (2), (3), or (7) of subdivision (a) of Section 261, Section 264.1, subdivision (b) of Section 288, Section 288.5 * * * or 289, of committing sodomy in violation of subdivision (k) of Section 286, of committing oral copulation in violation of subdivision (k) of Section 288a, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person whether or not the crimes were committed during a single transaction. If the term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment, and shall commence from the time the person otherwise would * * * have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would * * * have been released from prison.

(d) A full, separate, and consecutive term shall be served for each violation of Section 220, other than an assault with intent to commit mayhem, provided that the person has been convicted previously of violating Section 220 for an offense other than an assault with intent to commit mayhem, paragraph (2), (3), or (7) of subdivision (a) of Section 261, Section 264.1, subdivision (b) of Section 288, Section 289, of committing sodomy in violation of subdivision (k) of Section 286, of committing oral copulation in violation of subdivision (k) of Section 288a, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person if the crimes involve separate victims or involve the same victim on separate occasions.

In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions.

The term shall be served consecutively to any other term of imprisonment * * * and shall commence from the time the person otherwise would * * * have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would * * * have been released from prison.

(e) If the court orders a fine to be imposed pursuant to subdivision (a) or (b), the actual administrative cost of collecting that fine, not to exceed 2 percent of the total amount paid, may be paid into the general fund of the county treasury for the use and benefit of the county. *(Added by Stats.1979, c. 944, p. 3258, § 10. Amended by Stats.1985, c. 401, § 1, urgency, eff. July 30, 1985; Stats.1986, c. 1431, § 1; Stats 1987, c. 1068, § 4; Stats.1988, c. 1185, § 1; Stats.1989, c. 1402, § 7; Stats. 1993, c. 127 (S.B.468), § 1.)*

Cross References

Bail schedule, alleged facts requiring assignment of additional bail in adoption of uniform countywide schedule, see § 1269b.

Enhancement provided in this section to be pleaded and proved as provided by law, see § 1170.1.

Removal or release for educational purposes or to community correctional centers of persons committing offenses listed in this section prohibited, see § 2691.

Two or more felony convictions, consecutive terms of imprisonment, aggregate term to be sum of principal term, subordinate term, and any additional term imposed pursuant to this section, see § 1170.1.

§ 667.7. Habitual offenders; felonies involving great bodily injury

(a) Any person convicted of a felony in which the person inflicted great bodily injury as provided in Section 12022.7, or personally used force which was likely to produce great bodily injury, who has served two or more prior separate prison terms as defined in Section 667.5 for the crime of murder; attempted murder; voluntary manslaughter; mayhem; rape by force, violence, or fear of immediate and unlawful bodily injury on the victim or another person; oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; lewd acts on a child under the age of 14 years by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; a violation of subdivision (a) of Section 289 where the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another

WEST'S CALIFORNIA CODES

PENAL CODE

1994 Compact Edition

Supersedes 1993 Compact Edition

With Selected Penal Provisions From California Constitution, Business and Professions Code, Code of Civil Procedure, Health and Safety Code, Vehicle Code, Welfare and Institutions Code, and California Rules of Court

OFFICIAL CLASSIFICATION

Includes Laws through the 1993 portion of the 1993–1994 Regular and First Extraordinary Sessions and the November 2, 1993, Election

CALIFORNIA RULES OF COURT

Includes Amendments to Rules Received Through October 1, 1993

TITLE TWO. PRETRIAL AND TRIAL RULES

DIVISION III. SENTENCING RULES FOR THE SUPERIOR COURTS

Adopted by the Judicial Council of California Effective July 1, 1977

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CHAPTER 1. GENERAL PROVISIONS

Rule 401. Authority

The rules in this division are adopted pursuant to Penal Code section 1170.3 and pursuant to the authority granted to the Judicial Council by the Constitution, article VI, section 6, to adopt rules for court administration, practice and procedure.

Rule 403. Applicability

These rules apply only to criminal cases in superior courts in which the defendant is convicted of one or more offenses punishable as a felony by a determinate sentence imposed pursuant to chapter 4.5 (commencing with § 1170) of Title 7 of Part 2 of the Penal Code.

Rule 405. Definitions

As used in this division, unless the context otherwise requires:

(a) "These rules" means the rules in this division.

(b) "Base term" is the determinate prison term selected from among the three possible terms prescribed by statute or the determinate prison term prescribed by law if a range of three possible terms is not prescribed.

(c) "Enhancement" means an additional term of imprisonment added to the base term.

(d) "Aggravation" or "circumstances in aggravation" means facts which justify the imposition of the upper prison term referred to in section 1170(b).

(e) "Mitigation" or "circumstances in mitigation" means facts which justify the imposition of the lower of three authorized prison terms or facts which justify the court in declining to impose an enhancement when the court has discretion not to impose it.

(f) "Sentence choice" means the selection of any disposition of the case which does not amount to a dismissal, acquittal, or grant of a new trial.

(g) "Section" means a section of the Penal Code.

(h) "Imprisonment" means confinement in a state prison.

(i) "Charged" means charged in the indictment or information.

(j) "Found" means admitted by the defendant or found to be true by the trier of fact upon trial. *As amended, eff. July 28, 1977, Jan. 1, 1991.*

Rule 406. Reasons

(a) **[How given]** If the sentencing judge is required to give reasons for a sentence choice, the judge shall state in simple language the primary factor or factors that support the exercise of discretion or, if applicable, state that the judge has no discretion. The statement need not be in the language of these rules. It shall be delivered orally on the record.

(b) **[When reasons required]** Sentence choices that generally require a statement of a reason include: (1) granting probation; (2) imposing a prison sentence and thereby denying probation; (3) declining to commit to the Youth Authority an eligible juvenile found amenable for treatment; (4) selecting a term other than the middle statutory term for either an offense

or an enhancement; (5) imposing consecutive sentences; (6) imposing full consecutive sentences under section 667.6(c) rather than consecutive terms under section 1170.1(a), when the court has that choice; (7) striking or staying the punishment for an enhancement; (8) imposing both weapons and injury enhancements on a single count under section 1170.1(e); (9) waiving a restitution fine; (10) not committing an eligible defendant to the California Rehabilitation Center. *[Adopted, eff. Jan. 1, 1991.]*

Rule 407. Rules of Construction

As used in these rules:

(a) "Shall" is mandatory, "should" is advisory, "may" is permissive.

(b) The past, present, and future tenses include the others.

(c) The singular includes the plural. *As amended, eff. Jan. 1, 1991.*

Rule 408. Criteria Not Exclusive; Sequence Not Significant

(a) The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria shall be stated on the record by the sentencing judge.

(b) The order in which criteria are listed does not indicate their relative weight or importance.

Rule 409. Consideration of Criteria

Relevant criteria enumerated in these rules shall be considered by the sentencing judge, and shall be deemed to have been considered unless the record affirmatively reflects otherwise.

CHAPTER 2. PROVISIONS APPLICABLE TO ALL SENTENCING DECISIONS

Rule 410. General Objectives In Sentencing

General objectives of sentencing include:

(a) Protecting society.

(b) Punishing the defendant.

(c) Encouraging the defendant to lead a law abiding life in the future and deterring him from future offenses.

(d) Deterring others from criminal conduct by demonstrating its consequences.

(e) Preventing the defendant from committing new crimes by isolating him for the period of incarceration.

(f) Securing restitution for the victims of crime.

(g) Achieving uniformity in sentencing.

Because in some instances these objectives may suggest inconsistent dispositions, the sentencing judge shall consider which objectives are of primary importance in the particular case.

The sentencing judge should be guided by statutory statements of policy, the criteria in these rules, and the facts and circumstances of the case.

CHAPTER 3. PROBATION

Rule 411. Presentence investigations and reports

(a) **[Eligible defendant]** If the defendant is eligible for probation, the court shall refer the matter to the probation officer for a presentence investigation and report. Waivers of the presentence report should not be accepted except in unusual circumstances.

(b) **[Ineligible defendant]** Even if the defendant is not eligible for probation, the court should refer the matter to the probation officer for a presentence investigation and report.

(c) **[Supplemental reports]** The court shall order a supplemental probation officer's report in preparation for sentencing proceedings that occur a significant period of time after the original report was prepared.

(d) **[Purpose of presentence investigation report]** Probation officers' reports are used by judges in determining the appropriate length of a prison sentence and by the Department of Corrections in deciding upon the type of facility and program in which to place a defendant, and are also used in deciding whether probation is appropriate. Section 1203c requires a probation officer's report on every person sentenced to prison; ordering the report before sentencing in probation-ineligible cases will help ensure a well-prepared report. *Adopted, eff. Jan. 1, 1991.*

Rule 411.5. Probation officer's presentence investigation report

(a) **[Contents]** A probation officer's presentence investigation report in a felony case shall include at least the following:

(1) A face sheet showing at least: (i) the defendant's name and other identifying data; (ii) the case number; (iii) the crime of which the defendant was convicted; (iv) the date of commission of the crime, the date of conviction, and any other dates relevant to sentencing; (v) the defendant's custody status; and (vi) the terms of any agreement upon which a plea of guilty was based.

(2) The facts and circumstances of the crime and the defendant's arrest, including information concerning any co-defendants and the status or disposition of their cases. The source of all such information shall be stated.

(3) A summary of the defendant's record of prior criminal conduct, including convictions as an adult and sustained petitions in juvenile delinquency proceedings. Records of an arrest or charge not leading to a conviction or the sustaining of a petition shall not be included unless supported by facts concerning the arrest or charge.

(4) Any statement made by the defendant to the probation officer, or a summary thereof, including the defendant's account of the circumstances of the crime.

(5) Information concerning the victim of the crime, including: (i) the victim's statement or a summary thereof, if available; (ii) the amount of the victim's loss, and whether or not it is covered by insurance; and (iii) any information required by law.

(6) Any relevant facts concerning the defendant's social history, including but not limited to those categories enumerated in Penal Code section 1203.10, organized under appropriate subheadings, including, whenever applicable, "Family," "Education," "Employment and income," "Military," "Medical/psychological," "Record of substance abuse or lack thereof," and any other relevant subheadings.

(7) Collateral information, including written statements from: (i) official sources such as defense and prosecuting attorneys, police (subsequent to any police reports used to summarize the crime), probation and parole officers who have had prior experience with the defendant, and correctional personnel who observed the defendant's behavior during any period of presentence incarceration; and (ii) interested persons, including family members and others who have written letters concerning the defendant.

(8) An evaluation of factors relating to disposition. This section shall include: (i) a reasoned discussion of the defendant's suitability and eligibility for probation, and if probation is recommended, a proposed plan including recommendation for the conditions of probation and any special need for supervision; (ii) if a prison sentence is recommended or is likely to be imposed, a reasoned discussion of aggravating and mitigating factors affecting the sentence length; and (iii) a discussion of the defendant's ability to make restitution, pay any fine or penalty which may be recommended, or satisfy any special conditions of probation which are proposed. Discussions of factors affecting suitability for probation and affecting the sentence length shall refer to any sentencing rule directly relevant to the facts of the case, but no rule shall be cited without a reasoned discussion of its relevance and relative importance.

(9) The probation officer's recommendation. When requested by the sentencing judge or by standing instructions to the probation department, the report shall include recommendations concerning the length of any prison term that may be imposed, including the base term, the imposition of concurrent or consecutive sentences, and the imposition or striking of the additional terms for enhancements charged and found.

(10) Detailed information on presentence time spent by the defendant in custody, including the beginning and ending dates of the period(s) of custody; the existence of any other sentences imposed on the defendant during the period of custody; the amount of good behavior, work, or participation credit to which the defendant is entitled; and whether the sheriff or other officer holding custody, the prosecution, or the defense wishes a hearing be held for the purposes of denying good behavior, work, or participation credit.

(11) A statement of mandatory and recommended restitution, restitution fines, other fines, and costs to be assessed against the defendant, including chargeable probation services and attorney fees under section 987.8 when appropriate, findings concerning the defendant's ability to pay, and a recommendation whether any restitution order shall become a judgment under section 1203(j) if unpaid.

(b) [Format] The report shall be on paper 8-½ by 11 inches in size and shall follow the sequence set out in subdivision (a) to the extent possible.

(c) [Sources] The source of all information shall be stated. Any person who has furnished information included in the report shall be identified by name or official capacity unless a reason is given for not disclosing the person's identity. *Adopted, eff. July 1, 1981. As amended, eff. Jan. 1, 1991.*

Rule 412. Reasons. Agreement to punishment as reason and as abandonment of certain claims

(a) [Defendant's agreement as reason] It is an adequate reason for a sentence or other disposition that the defendant, personally and by counsel, has expressed agreement that it be imposed and the prosecuting attorney has not expressed an objection to it. The agreement and lack of objection shall be recited on the record.

(b) [Agreement to sentence abandons 654 claim] By agreeing to a specified prison term personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654's prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record. *Adopted, eff. Jan. 1, 1991.*

Rule 413. Probation eligibility when probation is limited

(a) [Consideration of eligibility] The court shall determine whether the defendant is eligible for probation.

(b) [Probation in unusual cases] If the defendant comes under a statutory provision prohibiting probation "except in unusual cases where the interests of justice would best be served," or a substantially equivalent provision, the court should apply the criteria in subdivision (c) to evaluate whether the statutory limitation on probation is overcome; and if it is, the court should then apply the criteria in rule 414 to decide whether to grant probation.

(c) [Facts showing unusual case] The following facts may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate:

(1) (Facts relating to basis for limitation on probation) A fact or circumstance indicating that the basis for the statutory limitation on probation, although technically present, is not fully applicable to the case, including:

(i) The fact or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence.

(ii) The current offense is less serious than a prior felony conviction that is the cause of the limitation on probation, and the defendant has been free from incarceration and serious violation of the law for a substantial time before the current offense.

(2) (Facts limiting defendant's culpability) A fact or circumstance not amounting to a defense, but reducing the defendant's culpability for the offense, including:

(i) The defendant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense, and the defendant has no recent record of committing crimes of violence.

(ii) The crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation.

(iii) The defendant is youthful or aged, and has no significant record of prior criminal offenses. *Adopted, eff. Jan. 1, 1991.*

Rule 414. Criteria Affecting Probation

Criteria affecting the decision to grant or deny probation include:

(a) Facts relating to the crime, including:

(1) The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime.

(2) Whether the defendant was armed with or used a weapon.

(3) The vulnerability of the victim.

(4) Whether the defendant inflicted physical or emotional injury.

(5) The degree of monetary loss to the victim.

(6) Whether the defendant was an active or passive participant.

(7) Whether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.

(8) Whether the manner in which the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant.

(9) Whether the defendant took advantage of a position of trust or confidence to commit the crime.

(b) Facts relating to the defendant, including:

(1) Prior record of criminal conduct; whether an an adult or a juvenile, including the recency and frequency of prior crimes; and whether the prior record indicates a pattern of regular or increasingly serious criminal conduct.

(2) Prior performance on probation or parole and present probation or parole status.

(3) Willingness to comply with the terms of probation.

(4) Ability to comply with reasonable terms of probation as indicated by the defendant's age, education, health, mental faculties, history of alcohol or other substance abuse, family background and ties, employment and military service history, and other relevant factors.

(5) The likely effect of imprisonment on the defendant and his or her dependents.

(6) The adverse collateral consequences on the defendant's life resulting from the felony conviction.

(7) Whether the defendant is remorseful.

(8) The likelihood that if not imprisoned the defendant will be a danger to others. *As amended, eff. Jan. 1, 1991.*

CHAPTER 4. AGGRAVATION, MITIGATION, AND ENHANCEMENT

Rule 420. Selection of base term of imprisonment

(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.

(b) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.

(c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.

(d) A fact that is an element of the crime shall not be used to impose the upper term.

(e) The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected. *As amended, eff. July 28, 1977; Jan. 1, 1991.*

Rule 421. Circumstances in aggravation

Circumstances in aggravation include:

(a) Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that:

(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.

(2) The defendant was armed with or used a weapon at the time of the commission of the crime.

(3) The victim was particularly vulnerable.

(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.

(5) The defendant induced a minor to commit or assist in the commission of the crime.

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process.

(7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed.

(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism.

(9) The crime involved an attempted or actual taking or damage of great monetary value.

(10) The crime involved a large quantity of contraband.

(11) The defendant took advantage of a position of trust or confidence to commit the offense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has engaged in violent conduct which indicates a serious danger to society.

(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness.

(3) The defendant has served a prior prison term.

(4) The defendant was on probation or parole when the crime was committed.

(5) The defendant's prior performance on probation or parole was unsatisfactory.

(c) Any other facts statutorily declared to be circumstances in aggravation. *As amended, eff. Jan. 1, 1991.*

Rule 423. Circumstances in mitigation

Circumstances in mitigation include:

(a) Facts relating to the crime, including the fact that:

(1) The defendant was a passive participant or played a minor role in the crime.

(2) The victim was an initiator of, willing participant in, or aggressor or provoker of the incident.

(3) The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.

(4) The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense.

(5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim.

(7) The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal.

(8) The defendant was motivated by a desire to provide necessities for his or her family or self.

(9) The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime; and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the facts concerning the abuse do not amount to a defense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has no prior record, or an insignificant record of criminal conduct, considering the recency and frequency of prior crimes.

(2) The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime.

(3) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.

(4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation.

(5) The defendant made restitution to the victim.

(6) The defendant's prior performance on probation or parole was satisfactory. *As amended, eff. Jan. 1, 1991; July 1, 1993.*

Rule 424. Consideration of applicability of section 654

Prior to determining whether to impose either concurrent or consecutive sentences on all counts on which the defendant was convicted, the court shall determine whether the proscription in section 654 against multiple punishments for the same act or omission requires a stay of imposition of sentence on some of the counts. *Adopted, eff. Jan. 1, 1991.*

Rule 425. Criteria affecting concurrent or consecutive sentences

Criteria affecting the decision to impose consecutive rather than concurrent sentences include:

(a) [Criteria relating to crimes] Facts relating to the crimes, including whether or not:

(1) The crimes and their objectives were predominantly independent of each other.

(2) The crimes involved separate acts of violence or threats of violence.

(3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.

(b) [Other criteria and limitations] Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except (i) a fact used to impose the upper term, (ii) a fact used to otherwise enhance the defendant's prison sentence, and (iii) a fact that is an element of the crime shall not be used to impose consecutive sentences. *As amended, eff. Jan. 1, 1991.*

Rule 426. Violent sex crimes

(a) [Multiple violent sex crimes] When a defendant has been convicted of multiple violent sex offenses as defined in section 667.6, the sentencing judge shall determine whether the crimes involved separate victims or the same victim on separate occasions.

(1) *(Different victims)* If the crimes were committed against different victims, a full, separate, and consecutive term shall be imposed for a violent sex crime as to each victim, under section 667.6(d).

(2) *(Same victim, separate occasions)* If the crimes were committed against a single victim, the sentencing judge shall determine whether the crimes were committed on separate occasions. In determining whether there were separate occasions, the sentencing judge shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. A full, separate, and consecutive term shall be imposed for each violent sex offense committed on a separate occasion under section 667.6(d).

(b) [Same victim, same occasion; other crimes] If the defendant has been convicted of multiple crimes, including at least one violent sex crime, as defined in section 667.6, or if there have been multiple violent sex crimes against a single victim on the same occasion and the sentencing court has decided to impose consecutive sentences, the sentencing judge shall then determine whether to impose a full, separate, and consecutive sentence under section 667.6(c) for the violent sex crime or crimes in lieu of including the violent sex crimes in the computation of the principal and subordinate terms under section 1170.1(a). A decision to impose a fully consecutive sentence under section 667.6(c) is an additional sentence choice which requires a statement of reasons separate from those given for consecutive sentences, but which may repeat the same reasons. The sentencing judge is to be guided by the criteria listed in rule 425, which incorporates rules 421 and 423, as well as any other reasonably related criteria as provided in rule 408. *Adopted, eff. Jan. 1, 1991.*

Rule 428. Criteria affecting imposition of enhancements

(a) [Imposing or not imposing enhancement] No reason need be given for imposing a term for an enhancement that was charged and found true.

If the judge has statutory discretion to strike the additional term for an enhancement, the court may consider and apply any of the circumstances in mitigation enumerated in these rules or, pursuant to rule 408, any other reasonable circumstances in mitigation that are present.

The judge should not strike the allegation of the enhancement.

(b) [Choice from among three possible terms] When the defendant is subject to an enhancement that was charged and found true for which three possible terms are specified by statute, the middle term shall be imposed unless there are circumstances in aggravation or mitigation or unless, under statutory discretion, the judge strikes the additional term for the enhancement.

The upper term may be imposed for an enhancement only when there are circumstances in aggravation that relate directly to the fact giving rise to the enhancement. The lower term may be imposed based upon any of the circumstances in mitigation enumerated in these rules or, under rule 408, any other reasonable circumstances in mitigation that are present. *Adopted, eff. Jan. 1, 1991.*

CHAPTER 5. PROCEDURAL PROVISIONS

Rule 431. Proceedings at Sentencing to be Reported

All proceedings at the time of sentencing shall be reported.

Rule 433. Matters to be Considered at Time Set for Sentencing

(a) In every case, at the time set for sentencing pursuant to section 1191, the sentencing judge shall hold a hearing at which the judge shall:

(1) Hear and determine any matters raised by the defendant pursuant to section 1201.

(2) Determine whether a defendant who is eligible for probation should be granted or denied probation, unless consideration of probation is expressly waived by the defendant personally and by counsel.

(b) If the imposition of sentence is to be suspended during a period of probation after a conviction by trial, the trial judge shall make factual findings as to circumstances which would justify imposition of the upper or lower term if probation is later revoked, based upon evidence admitted at the trial.

(c) If a sentence of imprisonment is to be imposed, or if the execution of a sentence of imprisonment is to be suspended during a period of probation, the sentencing judge shall:

(1) Hear evidence in aggravation and mitigation, and determine, pursuant to section 1170(b), whether to impose the upper, middle or lower term; and set forth on the record the facts and reasons for imposing the upper or lower term.

(2) Determine whether any additional term of imprisonment provided for an enhancement charged and found shall be stricken.

(3) Determine whether the sentences shall be consecutive or concurrent if the defendant has been convicted of multiple crimes.

(4) Determine any issues raised by statutory prohibitions on the dual use of facts and statutory limitations on enhancements, as required in rules 441 and 447.

(5) Pronounce the court's judgment and sentence, stating the terms thereof and giving reasons for those matters for which reasons are required by law.

(d) All these matters shall be heard and determined at a single hearing unless the sentencing judge otherwise orders in the interests of justice.

(e) When a sentence of imprisonment is imposed under subdivision (c) or under rule 435 the sentencing judge shall inform the defendant, pursuant to section 1170(c), of the parole period provided by section 3000 to be served after expiration of the sentence in addition to any period of incarceration for parole violation. *As amended, eff. July 28, 1977; Jan. 1, 1979.*

Rule 435. Sentencing upon revocation of probation

(a) When the defendant violates the terms of probation or is otherwise subject to revocation of probation, the sentencing judge may make any disposition of the case authorized by statute.

(b) Upon revocation and termination of probation pursuant to section 1203.2, when the sentencing judge determines that the defendant shall be committed to prison:

(1) If the imposition of sentence was previously suspended, the judge shall impose judgment and sentence after considering any findings previously made and hearing and determining the matters enumerated in rule 433(c).

The length of the sentence shall be based on circumstances existing at the time probation was granted, and subsequent events may not be considered in selecting the base term nor in deciding whether to strike or specifically not order the additional punishment for enhancements charged and found.

(2) If the execution of sentence was previously suspended, the judge shall order that the judgment previously pronounced be in full force and effect and that the defendant be committed to the custody of the Director of Corrections for the term prescribed in that judgment. *As amended, eff. Jan. 1, 1991.*

Rule 437. Statements in aggravation and mitigation

(a) Statements in aggravation and mitigation referred to in section 1170(b) shall be filed and served at least four days prior to the time set for sentencing pursuant to section 1191 or the time set for pronouncing judgment upon revocation of probation pursuant to section 1203.2(c) if imposition of sentence was previously suspended.

(b) A party seeking consideration of circumstances in aggravation or mitigation may file and serve a statement pursuant to section 1170(b) and this rule.

(c) A statement in aggravation or mitigation shall include:

(1) A summary of facts which the party relies upon as circumstances in aggravation or mitigation justifying imposition of the upper or lower term.

(2) Notice of intention to dispute facts or offer evidence in aggravation or mitigation at the sentencing hearing. The statement shall generally describe the evidence to be offered, including a description of any documents and the names and expected substance of the testimony of any witnesses. No evidence in aggravation or mitigation may be introduced at the sentencing hearing unless it was described in the statement, or unless its admission is permitted by the sentencing judge in the interests of justice.

(d) Assertions of fact in a statement in aggravation or mitigation shall be disregarded unless they are supported by the record in the case, the probation officer's report or other reports properly filed in the case, or other competent evidence.

(e) [Disputed facts] In the event the parties dispute the facts upon which the conviction rested, the court shall conduct a presentence hearing and make appropriate corrections, additions, or deletions in the presentence probation report or order a revised report. *As amended, eff. July 28, 1977; Jan. 1, 1991.*

Rule 447. Limitations on enhancements

No finding of an enhancement shall be stricken or dismissed because imposition of the term is either prohibited by law or exceeds limitations on the overall aggregate term, such as limits on subordinate terms, the double-the-base-term limitation, or limitations on the imposition of multiple enhancements. The sentencing judge shall impose sentence for the aggregate term of imprisonment computed without reference to those prohibitions and limitations, and shall thereupon stay execution of so much of the term as is prohibited or exceeds the applicable limit. The stay shall become permanent upon the defendant's service of the portion of the sentence not stayed. *As amended eff. July 28, 1977; Jan. 1, 1991.*

Rule 451. Sentence Consecutive to Indeterminate Term or to Term in Other Jurisdiction

(a) When a defendant is sentenced under section 1170 and the sentence is to run consecutively to a sentence imposed under section 1168 in the same or another proceeding, the judgment shall specify the determinate term imposed under section 1170 computed without reference to the indeterminate

sentence, shall order that the determinate term shall be served consecutive to the sentence under section 1168, and shall identify the proceedings in which the indeterminate sentence was imposed. The term under section 1168, and the date of its completion or parole date, and the sequence in which the sentences are deemed served, will be determined by correctional authorities as provided by law.

(b) When a defendant is sentenced under section 1170 and the sentence is to run consecutively to a sentence imposed by a court of the United States or of another state or territory, the judgment shall specify the determinate term imposed under section 1170 computed without reference to the sentence imposed by the other jurisdiction, shall order that the determinate term shall be served commencing upon the completion of the sentence imposed by the other jurisdiction, and shall identify the other jurisdiction and the proceedings in which the other sentence was imposed. *As amended, eff. Jan. 1, 1979.*

Rule 452. Determinate sentence consecutive to prior determinate sentence

If a determinate sentence is imposed pursuant to section 1170.1(a) consecutive to one or more determinate sentences imposed previously in the same court or in other courts, the court in the current case shall pronounce a single aggregate term, as defined in section 1170.1(a), stating the result of combining the previous and current sentences. In those situations:

(1) The sentences on all determinately sentenced counts in all of the cases on which a sentence was or is being imposed shall be combined as though they were all counts in the current case.

(2) The judge in the current case shall make a new determination of which count, in the combined cases, represents the principal term, as defined in section 1170.1(a).

(3) Discretionary decisions of the judges in the previous cases shall not be changed by the judge in the current case. Such decisions include the decision that other than the middle term was justified by circumstances in mitigation or aggravation, making counts in prior cases concurrent with or consecutive to each other, or the decision that circumstances in mitigation justified striking the punishment for an enhancement. *Adopted, eff. Jan. 1, 1991.*

Rule 453. Commitments to Nonpenal Institutions

When a defendant is convicted of a crime for which sentence could be imposed under section 1170 and the court orders that he be committed:

(a) To the California Youth Authority pursuant to Welfare and Institutions Code section 1731.5, the order of commitment shall specify the term of imprisonment to which the defendant would have been sentenced. The term shall be determined as provided by sections 1170 and 1170.1 and these rules, as though a sentence of imprisonment were to be imposed.

(b) As a mentally disordered sex offender pursuant to Welfare and Institutions Code section 6316, the order of commitment shall specify the maximum term of commitment, computed as provided in section 6316.1 of that code. *As amended, eff. July 28, 1977.*

Rule 470. Notification of appeal rights

After imposing sentence or making an order deemed to be a final judgment in a criminal case upon conviction after trial, or after imposing sentence following a revocation of probation, except where the revocation is after the defendant's admission of violation of probation, the court shall advise the defendant of his or her right to appeal, of the necessary steps and time for taking an appeal, and of the right of an indigent defendant to have counsel appoint by the reviewing court. A reporter's transcript of the proceedings required by this rule shall be forthwith prepared and certified by the reporter and filed with the clerk. *Adopted, eff. Jan. 1, 1972. As amended, eff. July 1, 1972; Jan. 1, 1977. Renumbered and amended, eff. Jan. 1, 1991.*

Rule 472. Determination of presentence custody time credit

At the time of sentencing, the court shall cause to be recorded on the judgment or commitment the total time in custody to be credited upon the sentence under Penal Code section 2900.5. Upon referral of the defendant to the probation officer for an investigation and report under Penal Code section 1203(a) or 1203(f), or upon setting a date for sentencing in the absence of a referral, the court shall direct the sheriff, probation officer, or other appropriate person to report to the court and notify the defendant or defense counsel and prosecuting attorney within a reasonable time prior to the date set for sentencing as to the number of days that defendant has been in custody and for which he or she may be entitled to credit. Any challenges to the report shall be heard at the time of sentencing. *Adopted, eff. Jan. 1, 1977. Renumbered and amended, eff. Jan. 1, 1991.*

Rule 490. Setting Date for Execution of Death Sentence

(a) [Open session of court; notice required] A date for execution of a judgment of death under section 1193 or section 1227 of the Penal Code shall be set at a public session of the court at which the defendant and the people may be represented.

At least 10 days before the session of court at which the date will be set, the court shall mail notice of the time and place of the proceeding by first-class mail, postage prepaid, to the Attorney General, the district attorney, the defendant at the prison address, the defendant's counsel or, if none is known, counsel who most recently represented the defendant on appeal or in postappeal legal proceedings, and the executive director of the California Appellate Project in San Francisco. The clerk shall file a certificate of mailing copies of the notice. The court shall not hold the proceeding or set an execution date unless the record contains a clerk's certificate showing that the notices required by this subdivision were timely mailed.

Unless otherwise provided by statute, the defendant does not have a right to be present in person.

(b) [Selection of date; notice] If, at the announced session of court, the court sets a date for execution of the judgment of death, the court shall mail certified copies of the order setting the date to the warden of the state prison and to the Governor, as required by statute; and shall also, within five days of the making of the order, mail by first-class mail, postage prepaid, certified copies of the order setting the date to each of the persons required to be given notice by subdivision (a). The clerk shall file a certificate of mailing copies of the order. *Adopted, eff. July 1, 1989. As amended, eff. July 1, 1990.*